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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

GURN H. FREEMAN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ORAL ARGUMENT REQUESTED

ISSUES PRESENTED FOR REVIEW

1. May evidence of *clients' representations, conclusions* and *impressions* regarding funding by Century be admitted against the accused on the question of whether or not the *accused actually represented* to such client(s) that Century would obtain financing for the clients' business endeavors when each client's written offer of service expressly rejected such funding by Century Consultants for the fees in question.

2. May specific intent under 18 U.S.C. § 1341 be found by: the lack of future performance when the clients foreclosed such performance; an "unalleged" unsound business concept when numerous nationally known experts concur with Appellant's concept as being the best method to secure the most amount of venture capital for start-up companies and when more clients succeeded as a result of Appellant's services than failed; and by various alleged misrepresentations either directly contradicted by the alleged victims or not evidenced by the record.

3. The Court committed plain error when it arbitrarily included limited offerings (that were to be funded by the clients) with secondary financing to be secured by Century Consultants on a contingent fee; such theory was contrary to all contracts, the alleged victims' testimony, and the Government's own admission as to what constituted secondary financing and who had to obtain funding for limited offerings and thereby held Appellant responsible for funding limited offerings and implied seed capital was to be paid for funding efforts as opposed to payment for credit extended on the limited offering business plan as set forth in the contracts.

4. May the accused be found guilty of committing mail fraud where the "scheme to defraud" as specifically pleaded in the Indictment is not supported by a scintilla of evidence?

5. Whether or not the requirements of a Fair Trial are satisfied wherein petitioner's guilt was premised upon extraneous matter not contained or otherwise supported in the record such as fourteen "victim" witnesses allegedly testifying Appellant promised funding when in fact seven "victim" witnesses either didn't testify or such persons had no knowledge of Appellant; another witness was only introduced; still another witness could not remember any discussions and the remaining five witnesses' testimony was contrary to such finding—and the like.

6. May a conspiracy conviction rest upon a conclusion that sufficient evidence existed when the evidence did not demonstrate: an agreement to conspire; a divergence from legal to illegal conduct; proof of membership by independent evidence or a single misrepresentation made by the accused as alleged in the Indictment.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER LEGAL AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	
I	
The Court's Opinion attempts to redefine what constitutes a false and fraudulent promise or representation *made by defendant* for the purpose of obtaining money or property under 18 U.S.C. § 1341 by substituting *no evidence* of Appellant's alleged misrepresentations to provide funding [Indictment para. 3 and 4 (f)] for evidence of *"alleged victims'" representations* (not Appellant's) that their alleged purpose in hiring Century was to have Century seek funding on their behalf; such construction of the statute and indifference toward the lack of support for the substantive charges in the Indictment conflicts with a litany of case law both within and outside of the Sixth Circuit Court of Appeals.	5
II	
The Court's opinion attempts to redefine what constitutes knowledge and intent under 18 U.S.C. § 1341 by suggesting mere opinion, lack of future performance, an "unalleged" unsound business concept; and various "alleged" misrepresentations not evidenced by the record (testimony and exhibits) demonstrates "specific intent"	

Page

and somehow negates the history and time proven methods which formulated Appellant's (Century Consultants) belief in his ability to assist clients in meeting their needs—such Court opinion clearly conflicts with a litany of case law both within and outside of the Sixth Court of Appeals. 7

III

Para. 6 of the Indictment charges that clients were informed they had to raise seed capital which would have to be paid to Century Consultants to continue work on arranging the majority of the financing; the Court's opinion alludes to para. 6 by arbitrarily holding that there was only *one type* of business plan and that all funding beyond seed capital was "secondary financing" which was to be obtained through Century Consultants' sources. However, the Court "omitted" the limited offering business plans, which clearly were not any part of secondary financing (contrary to Government's admission) and disregarded the proof that seed capital was not to be paid for anything other than the credit that had been extended for the production of the limited offering comprehensive business plan. 21

IV

The scheme to defraud as depicted in the Indictment, paragraphs 1–8, was not supported by a scintilla of evidence; Appellant did not represent or otherwise promise funding by Century as described therein, and such Court's affirmance of Appellant's conviction for mail fraud is unconstitutional under the Due Process Clause of the Fifth Amendment. 23

V

Appellant was effectively denied his right to a fair trial by the Court introducing extraneous matter not found in the record. *Amendment V, United States Constitution.* 25

VI

There is a plain conflict between the Circuits wherein the Court below did not attempt to demonstrate: the existence of a conspiracy agreement; a divergence from

Page

legal to illegal conduct; proof of Appellant's membership in the alleged conspiracy by independent evidence; and a single act specifically alleged as "part of the scheme and artifice to defraud" as enumerated with paragraphs 1 thru 8, Count 1, inclusively..... 27

CONCLUSION..... 30

APPENDIX A, OPINION OF COURT BELOW..... A, 1–10

APPENDIX B, JUDGEMENT AND ORDERS ON REHEARING..... B, 1–3

APPENDIX C, (See Record of the Court Below)..... C, 1

APPENDIX D, STATUTES AND OTHER LEGAL AUTHORITIES..... D, 1–4

APPENDIX E, GOVERNMENT ADMISSIONS..... E, 1

APPENDIX F, FINANCIAL AUTHORITIES..... F, 1–6

TABLE OF AUTHORITIES

	Page
Cases:	
Calderon v. *Atlas S.S. Co.*, 170 U.S. 272, 280, 18 S. Ct. 906 (1898)	6
Epstein v. *U.S.*, 174 F.2d 754 (6th Cir. 1949)	5
Harrison v. *U.S.*, 200 F 662, 665 (6th Cir. 1912)	10
Ingram v. *U.S.*, 360 U.S. 672, 680, 79 S. Ct. 1314, 1320 (1959)	13, 30
IN RE Winship, 397 U.S. 358, 363–64, 397 S. Ct. 1068 (1970)	20
Mutual Life Insurance Company v. *Phinney*, 178 U.S. 327, 340, 20 S. Ct. 906 (1900)	6, 10
Sparrow v. *U.S.*, 402 F.2d 826, 828–29 (10th Cir. 1968)	14
Thompson v. *Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960)	25
U.S. v. *Herr*, 338 F.2d 607 (7th Cir. 1964)	7
U.S. v. *Klein*, 515 F.2d 751, 753 (3rd Cir. 1975)	29, 30
U.S. v. *Pearlstein*, 576 F.2d 531, 540 (Fn. 3) (3rd Cir. 1978)	9
U.S. v. *Rabinowitz*, 327 F.2d 62, 66, 81 (6th Cir. 1964)	5, 7, 11, 17, 20
U.S. v. *Regent Office Supply Co.*, 421 F.2d 1174, 1179 (2nd Cir. 1970)	9
U.S. v. *Shelton*, 669 F.2d 446 (7th Cir. 1982)	11, 12, 14, 29
U.S. v. *Swarthout*, 420 F.2d 831 at 833 (6th Cir. 1970)	21
U.S. v. *Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979)	6
U.S. v. *Wieschenberg*, 604 F.2d 326, 331 (5th Cir. 1979)	28, 30
West v. *U.S.*, 68 F.2d 96 (10th Cir. 1933)	7

Page

Other Legal Authorities:

Amendment V, U.S. Constitution 23, 25, 27

Corbin on Contracts, 1 Vol. Ed. (1980) § 25, p. 43; § 1252 at p. 1010, 1011 ..... 7, 10

Michigan Securities Regulations: Chapter 188, Uniform Securities Act, Act 265 of 1964, Title 19—Trade and Commerce, Part IV § 19.776 (402), § § 10(A), p. 247 M.S.A. .. 13

Restatement, Contracts § 395 and § 274 (1) (Fn. 1) 10

Uniform Commercial Code § 2–202: "Final Written Expression" 6, 7

Financial Authorities:

Alan J. Barton, Counsel for the National Venture Capital Association, App. F, (3–4 f.) 16

Business Week Supplement, "Venturing into Venture Capitalism, " App. F, (6 f.)..... 17

Ernest D. Chu, "Selecting the Right Venture Capitalist," App. F, (2 f.) 19

Forbes Magazine, "Venture Capital—Business Plan," App. F, (6 f.)..... 16

Brian Haslett and Leonard E. Smollen, "Preparing a Business Plan," App. F, (3 f.)..... 17

Stanley M. Rubel, *Guide to Venture Capital Sources:*
Preface, App. F, (1–2 f.) 18
"Private Financing Sources," App. F, (5–6 f.).....16, 17, 18
"United States Venture Capital Companies," App. F, (4–5).

Small Business Administration, App. F, (1 f.) 8

David Silver, "How to Raise and Utilize Venture Capital," App. F, (2–3 f.) 18, 19

OPINION BELOW

The unpublished opinion of the United States Sixth Circuit Court of Appeals is set forth in the Appendix as Appendix A.

JURISDICTION

The judgement sought to be reviewed was issued and entered on October 1, 1982; petition for rehearing *en banc* was sought and it was denied on November 24, 1982 and was reissued on December 9, 1982 and all of which are set forth in the Appendix as Appendix B. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

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6. May a conspiracy conviction rest upon a conclusion that sufficient evidence existed when the evidence did not demonstrate: an agreement to conspire; a divergence from legal to illegal conduct; proof of membership by independent evidence or a single misrepresentation made by the accused as alleged in the Indictment.

PROCEEDINGS IN THE COURT BELOW

This criminal action was commenced on 7/8/80 by the United States of America, in the United States District Court for the Western District of Michigan, Southern Division, against petitioner, Gurn H. Freeman, Sr. Petitioner was convicted of devising scheme or artifice to defraud by use of U.S. mails; aiding and abetting. *Counts 1, 2, 3, and 4*; 18 U.S.C. § 1341; 18 U.S.C. § 2 (a). Transportation in Interstate Commerce of securities obtained by fraud; aiding and abetting. *Count 7*; 18 U.S.C. §2314; 18 U.S.C. § 2 (a). Conspiracy to defraud the United States; aiding and abetting. *Count 8*; 18 U.S.C. § 371; 18 U.S.C. § 2 (a). Petitioner was acquitted of causing to be transmitted in interstate commerce by means of a wire communication for the purpose of executing the aforementioned scheme and artifice. *Counts 5 and 6*; 18 U.S.C. § 1343; 18 U.S.C. § 2 (a). [See, App. D, (2–3 d.), for full text of statutes.]

On 9/8/80, the District Court entered judgement finding the petitioner guilty of 18 U.S.C. § 1341; 18 U.S.C. 2314; 18 U.S.C. 2 (a); and 18 U.S.C. § 371 and sentenced him to imprisonment for five years as to each of Counts 1, 3 and 8, to run concurrently as to each of these Counts—as to Counts 2, 4 and 7, is to be placed on probation for five years to run concurrently upon release from confinement in a penal institution. Petitioner was also fined $1,000 as to Count 3 and $10,000 as to Count 8.

Petitioner filed notice of appeal on 9/8/80. The United States Court of Appeals for the Sixth Circuit entered judgement on 10/1/82, affirming all Counts: 1, 2, 3, 4, 7 and 8.

STATEMENT OF FACTS

Appellant has been a full time professional business consultant since 1967. He established Century Consultants in 1971 and operated this firm as a sole proprietorship until January 1974 when it was incorporated. In February 1974 Appellant began his slow withdrawal from the firm by setting forth the business concept for future management to follow (i.e., Eckersberg Memorandum and Operations Manual) which was based upon the successful operations of the sole proprietorship.

Century Consultants, by and through their Comprehensive Business

Plans, have "helped" many clients achieve their venture capital needs via the "limited offering" capitalization by the client and his principals (i.e., Brown, Fouts, Whitmer, Haas, Coville Engineering, and the like). Century Consultants' primarily produced business plans calling for "limited offering" capitalization by the client which, in the initial stage of capitalization, is the most common way to obtain equity capital.

Prior to the Indictment period Century only had one client whose capitalization needs were greater than the amount called for in the "limited offering" plan, thus Coville Engineering (the client) was offered "secondary funding" efforts by Century via "private placement" upon the successful conclusion of their "limited offering." Coville raised the limited offering and thereafter Appellant designed a "financial proposal" for the "secondary funding" and subsequently sought out and located Mr. Oberman (a source). After doing some additional investigation with respect to $10.5 million in mortgage financing to be secured by land, buildings, and equipment, Oberman put together a group of investors (Oberman included) willing and able to put up the intermediate $1.5 million upon Coville finalizing a sales contract with the recipient of the Coville product. (Delaware County, Pennsylvania originally was interested in a solid waste plant.) Appellant performed as promised by locating a source willing and able to finance; however, his fee was contingent upon the final negotiations which never materialized and, it should be noted, the project did not fail for lack of funding.

Like prior client Brown's house raising construction company, Mr. Herbert's clothing store, Mr. Jenkins' tool and die shop, Mr. Clark's insurance business and Mr. Erbe's cabinet manufacturing business, these four "alleged victims'" businesses did not need a greater amount of venture capital (equity) than any other client Century had "helped" excepting Coville Engineering. Thus Century believed that they should capitalize their businesses via a limited offering to be sold by the clients themselves. Such belief was set forth in writing and Century further stated their belief that "private placement" funding to financial institutions (by Century) was not feasible because they would have to put up too much money with such organizations to attempt a private placement at a time when their position is not really strong enough. Each individual received a written offer of services for his consideration (uninterrupted by Century from 2 to 6 weeks). Each individual paid the retainer fee (ranging from $500 to $5,000) *in response* to such offer to wit Century then was authorized to produce a business plan wherein the capitalization was to be designed so that a limited offering could be sold by the client. Century performed pursuant to such offers as admitted by the Government. The Government further admitted "most knew they had to raise their own limited offering." Although these clients may have come to Century

Consultants seeking funding by Century Consultants, these clients never bargained for funding by Century. No defendant made a single representation with regard to Century funding these clients' limited offerings businesses.

Like the Coville Engineering project, Mr. Edelman's photo lab business, Mr. Morgan's amusement park, and Mr. Webster's shopping center, these three "alleged victims'" businesses needed a greater amount of venture capital (equity) than is feasible to raise via "limited offering" only-type of business plans. Appellant made oral and written representations that Century would seek "secondary funding" upon completion of these clients' "limited offering." Originally only Edelman would retain and authorize Century to produce the "limited offering" type business plan *and* thereafter, upon successful completion of limited offering capitalization by Edelman, Century was to design a "financial proposal" (secondary funding business plan) at $50/hr. and thereafter seek the secondary financing for Edelman upon a contingency fee basis. Webster, on the other hand, chose to retain and authorize Century to *only* produce a "limited offering" type business plan to be capitalized by Webster. Webster would eventually pay Century in full for such a business plan ($7,500), prior to even authorizing Century to perform such future services ("secondary funding") as contemplated in the original offer. Morgan would never authorize Century to perform the future service of "secondary funding;" he specifically retained and authorized Century to *only* produce the business plan wherein limited offering capital was to be obtained by the client. Where Coville raised their limited offering to permit Appellant to begin the "secondary funding" phase, Edelman didn't sell the first dollar's worth of his limited offering because he elected not to proceed; Webster raised $25,000 in seed capital and sold $40 to $45,000 of such stock but embezzled stockholders' money; and Morgan refused *all* offers for secondary funding. Appellant's future performance was foreclosed by the very parties the Court claims to have been defrauded by such lack of funding efforts. Appellant never performed such future "secondary funding" services for reasons unrelated to Appellant's intent or ability to perform.

Appellant's stated intention to slowly withdraw from Century, as set forth in the Eckersberg Memorandum, was evidenced by his actions with regard to client work and the varying capacities under which he was later employed. The bulk of the interviewing, client contact and actual performance, the production of the business plan, was accomplished by the five other consultants of Century.

After January 3, 1975, Powell replaced Appellant as an officer, director, and employee of Century, Inc.; Appellant resigned from such positions and became a sub-contractor for the firm so that Appellant

could spend more time to build a new business, American Business Consultants, Inc., which he still owns and operates today. On 1/3/75, Wagner and Powell were first introduced and up until 5/14/75, Wagner continued to perform in the capacity to wit he was first hired (to develop marketing plans) and Powell held a few free exploratory meetings (with non-alleged victims) and contacted previous clients of Century to seek repeat business, which was previously noted as a very important source of income (i.e., letter and visit to Jenkins). On 5/14/75, Powell and Wagner's partnership purchased the assets and liabilities of Century Consultants, Inc. to form Century Consultants Corp., and embarked on a new theory for funding clients, however they chose to continue the sub-contracting relationship (Century, Inc. began 1/3/75) with Appellant until the fall of 1975. The severance of all ties between the parties at that time was termed by Wagner a "complete business divorce."

The conspiracy theory forwarded by Government briefs and the Court rests upon the conclusions that a conspiracy existed between the defendants, however, no facts were cited relating to how, when, or with whom it began or continued. The sub-contracting relationship between Appellant and Century, Inc. and Appellant and Century Corp. (Powell and Wagner) evidences a different sort of relationship.

REASONS FOR GRANTING THE WRIT

I

The Court's opinion attempts to redefine what constitutes a false and fraudulent promise or representation *made by defendant* for the purpose of obtaining money or property under 18 U.S.C. § 1341 by substituting *no evidence* of Appellant's alleged misrepresentations to provide funding [Indictment para. 3 and 4 (f)] for evidence of *"alleged victims'" representations* (not Appellant's) that their alleged purpose in hiring Century was to have Century seek funding on their behalf; such construction of the statute and indifference toward the lack of support for the substantive charges in the Indictment conflicts with a litany of case law both within and outside of the Sixth Circuit Court of Appeals.

I

The Court argues that, notwithstanding the unrebutted facts that clients received exactly what the parties had bargained for, "there is sufficient evidence in the record of a scheme to defraud." [App. A, (3-4 a.)] We do not argue that the indictment is deficient in pleading or that *Epstein* v. *U.S.*, 174 F.2d 754 (6th Cir. 1949) and *U.S.* v. *Rabinowitz*, 327 F.2d 62 (6th Cir. 1964) as cited by the Court [App. A, (4 a.)] are somehow improper case law to establish a scheme to defraud via knowing misrepresentations *made by a defendant*. It is, however, the Court's divergence from the Indictment [See App. C, (A-8, 9 c.):

Specifically, para. 3 and 4 (f)] and the case law cited above, which together require proof of misrepresentations *made by defendant* that causes petitioner to question the Court's finding of guilt based upon the *clients' representations* to Century and that such purpose for hiring Century [clients' primary goal: to have Century Consultants find investors for their projects . . . App. A, (4 a.)] was not fulfilled, therefore such clients were defrauded.

It is here that the Court attempts to broaden the statute and case law to encompass a new and apposite strain of mail fraud. The Court merely discounts such intent of Appellant performing pursuant to such acknowledged contracts [See, App. E, (1 e.)Government's Second Reply Brief, p. 23] as inappropriate conduct which "did nothing to further the clients' primary goal. [App. A, (4 a.)]

It is our contention that such "subjective" impressions and conclusions of the clients in coming to Century Consultants was *knowingly bargained away* [See, i.e. App. C: subjective impressions and conclusions of Herbert at (Tr. 321c) and the Clarks at (Tr. 392c)]. The offers of services to be rendered by Century was not silent with regard to "clients' primary goal;" such goal was absolutely rejected as not feasible. [i.e. App. C, (X-6c; X-113c; X-232c; X-251c; X-290c; X-293c)]. All clients knew or should have known that they were to raise their own limited offerings as disclosed in the actual offers of service [App. E, (1 e.); See, admission by the Government: "most clients knew;" also see, App. D, (6 d.): U.C.C. § 2-202: "Final Written Expression"] The plain language used to describe the obligations of the contracting parties was understood by the contracting parties and therefore such agreement which offered an alternative means by which clients could achieve funding could not be described as reasonably calculated to deceive persons of ordinary prudence and comprehension *U.S.* v.*Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979). Also, in *Mutual Life Insurance Company* v. *Phinney*, 178 U.S. 327, 340, 20 S. Ct. 906 (1900) the United States Supreme Court decided, "If there was a full and fair understanding between these two men in that matter . . . and each relied upon that understanding . . . (no fraud) because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished." Why should Appellant be held accountable for that which the clients voluntarily relinquished? When the clients failed in their endeavor to achieve their primary goal, funding, through the agreed upon alternative means, the Court below concluded that Appellant did nothing to further the "clients' primary goal." In *Calderon* v. *Atlas S.S. Co.*, 170 U.S. 272, 280, 18 S. Ct. 588 (1898), this Court held that where the language is clear and explicit, there is no call for construction by the courts to find the presumed intention of

the parties . . . such parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts. Appellant defrauded no one by accepting money in exchange for the services which were subsequently rendered pursuant to a written agreement to wit no misrepresentations, no overreaching, and no duress was established in the record as to *those* contracts. [See, App. D, (6 d.): U.C.C. § 2-202, *supra*]

The Court alleges an active misrepresentation in attempting to establish "clients' primary goal" as originating within Century Consultants, however, the advertisement [App. C, (X-328c)] did not solicit a single "alleged victim." Morgan testified as having coincidentally seen the ad at the time he was introduced to Century, however, "that's really all there was to that." [App. C, (Tr. 494c)]. All clients were referrals [App. C, (Tr. 102c; 117c; 298c; 366c; 470c; 494c; 645c)]. No other "alleged victim" saw the ad which querried businessmen needing *limited offering* and/or possible *private placement* venture capital.

Notwithstanding the fact that no "alleged victim" was solicited by the ad, the Court's interpretation of the ad conflicts with the common law . . . such ad, "Need Venture Capital?" etc. is not a specific offer to the public looking for acceptance, rather it is merely an announcement that Century Consultants has services available which seek to remedy such problems. [See, *Corbin on Contracts*, 1 Vol. Ed. (1980) § 25, p. 43; App. D, 3 d.)]

The case law with regard to misrepresentations *made by accused* which were known to be false when made is quite extensive. [i.e., *U.S.* v. *Rabinowitz*, 327 F.2d 62 (6th Cir. 1964); *U.S.* v. *Herr*, 338 F.2d 607 (7th Cir. 1964); *West* v. *U.S.*, 68 F.2d 96 (10th Cir. 1933) and others] I have no knowledge of any case law whereby representations *made by "alleged victims"* not supported by money, property, or promise of performance by accused led to a finding of a scheme to defraud within 18 U.S.C. § 1341.

The Court's opinion attempts to redefine 18 U.S.C. § 1341 mail fraud by insinuating that because "clients' primary goal" was their stated purpose for coming to Century, Appellant had somehow obligated himself to seek such funding irrespective of the parties' "final written expression" and notwithstanding the facts that such "clients' primary goal" was specifically rejected by Appellant and was neither supported by consideration or originated by and/or reinforced by Appellant. Such construction of the statute and Indictment clearly conflicts with a litany of case law within and outside of the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

II

The Court's opinion attempts to redefine what constitutes knowledge and intent under 18 U.S.C. § 1341 by suggesting mere opinion, lack of

future performance, an "unalleged" unsound business concept; and various "alleged" misrepresentations not evidenced by the record (testimony and exhibits) demonstrates "specific intent" and somehow negates the history and time proven methods which formulated Appellant's (Century Consultants) belief in his ability to assist clients in meeting their needs—such Court opinion clearly conflicts with a litany of case law both within and outside of the Sixth Circuit Court of Appeals.

II

The Court's justification for finding "knowledge" and "specific intent" rests upon inferences drawn from client's lack of success and Appellant's omission to act upon "clients' primary goal." Petitioner wishes to review such collateral theory of "specific intent" first upon the reasonableness of the Court's inferences in light of charges set forth in the Indictment, and secondly, upon how the Court can reconcile Appellant's "good faith defense," which is ordinarily a complete defense of fraud, in light of the Court's collateral theory.

"Expressed Opinion" Inferences Abound

Century did represent to seven clients via the retainer contracts (Appellant authored four), that *with the proper investment capital* such businesses *could* operate at a profit. None of the seven clients' (pre-"business divorce") businesses were *ever* capitalized to the extent upon which the representation had envisioned. Where the clients' businesses did open their doors to the public, the trial court precluded bonafide audits of their operations to see if such businesses *ever* operated at a profit or otherwise. [App. C, (Tr. 28–31c)] Also note the question of operating at a profit was moot as to Edelman, Morgan and Webster as their business endeavors were *never* open to the public.

The Court argues that the "expressed opinion" in each retainer letter [i.e. App. C, (X-5c)]: "We believe that your basic program is sound and that with the proper investment capital you could operate such a business at a profit," evidences a knowing misrepresentation from which the jury could find Appellant had "no basis in fact for believing that the business to be operated . . . would be profitable, and that Appellant's expressed opinion to that effect was therefore not actually entertained or at least not honestly entertained." [App. A, (4 a.)] The rate of failure in new businesses (75–80%) is not particularly relevant to such clients, according to expert witness Abel. (Tr. 1072c) Most businesses fail because of poor management; and not because the business concept is not viable. [See, SBA booklet: App. F, (1 f.)]

Petitioner believes such "expressed opinion" does not reach the heart of the bargain nor does it pertain to the quality, adequacy or price of the Comprehensive Business Plan; such representation amounts to nothing

more than mere opinion or "puffing" which is not cognizable under federal mail fraud statute, 18 U.S.C. § 1341. *U.S.* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1179 (2nd Cir. 1970) and *U.S.* v. *Pearlstein*, 576 F.2d 531, 540 (Fn. 3) (3rd Cir. 1978). Such expressed opinion did not guarantee success or deceive persons of ordinary prudence and comprehension. The "alleged victims" must have believed that "with the proper investment capital," they *could* operate such businesses at a profit, otherwise, why would such clients seek additional capital and/or ever go into business for themselves. Neither the Indictment nor the clients claimed Appellant misled by such "expressed opinion."

Alleged Lack of Performance by Appellant

The Court also claims that "Freeman further misrepresented that Century would provide the sources . . . investors of his clients (Tr. at 123, 133, 162, 172)." [App. A, (5 a.)] Representations of *Phase II* funding were made to Edelman (Tr. at 123c; 133c; 162c; 172c); however, what prevented Freeman from putting together the "financial proposal" that he was going to use to seek financing for Mr. Edelman's Phase II funding (Tr. 123c)? What prevented Appellant from carrying out his assurance to Mr. Webb (Tr. 133c) that Appellant believed he could raise Edelman's "secondary financing" (Phase II) which was required to execute the Webb-Edelman buy-out option agreement [App. C, (X-299, 300c]? Note Edelman's continued *belief* that Century would help raise funding is based upon discussions and the contract (Tr. 162c). Also note the Court was not reluctant to cite what *reinforced the belief* of the client even though such question and answer was objected to and sustained at Tr. 162c (See, Fair Trial Argument, para. 4, p. 25). At Tr. 172c Conrad relates his memory of the bargain when the "Best Evidence" of the agreement remained unread in his hand, Government Exhibit I–11 (Tr. 171c). Conrad did recall the condition precedent to Appellant's undertaking "major financial step"—Edelman must raise initial seed capital [Conrad's memory was wrong on amount of seed capital . . . and omitted to state how much capital was to be raised via Phase I "limited offering"—see Tr. 176–77c, testimony from document:Conrad stated, Edelman and principals must raise $250,000 limited offering, [App. C, (X-295c, para. 3c)] and such "limited offering" capitalization was described by Century as the "hardest part." (Tr. at 172c) Whose conduct prevented such future performance . . . if Edelman, then no misrepresentations.

Petitioner believes Edelman's rights to such future performance terminated upon *his* decision: "I elected not to carry on with that deal." [App. C, (Tr. 149–50c)] The Court's finding of misrepresentation rests upon Appellant's non-performance, however, such a conclusion of "fact" is inconsistent with Appellant's contractual rights under the agreement.

[See *Corbin on Contracts*, 1 Vol. Ed. p. 1010–1011 § 1252 "Discharge of Duty by Non-performance of a Condition;" also see "Restatement, Contracts § 395 and § 274 (1), App. D,(4d.)] The fact Appellant raised no funds for Edelman does not support a finding of misrepresentation or that Appellant never intended to perform. In *Harrison* v. *U.S.*, 200 F 662, 665 (6th Cir. 1912) that Court stated:

> ". . . the scheme cannot be found in any mere expression of honest opinion as to quality or as to future performance. There must be the underlying intent to defraud." [*Id* at 665]

Appellant performed *all that he could* pursuant to Edelman's contract by delivering up the Phase I Comprehensive Business Plan [App. C, (Tr. at 162c)] How does one approach an "institutional investor" (source) to secure secondary funding for an individual who has "elected not to carry on with that deal?" Appellant's representations to Edelman, though unfulfilled, were not false when made within the context of the bargain struck to wit Edelman breached. In light of *Mutual Life Insurance Co.* v. *Phinney, supra,* at 639–40, Edelman's actions would constitute an abandonment and rescission of this contract with respect to *both* parties and thus excuse Appellant as to *any* future performance as of time of breach. The Court was mistaken with respect to Appellant's duty to act prior to the breach or thereafter.

Alleged Unsound Business Concept

The Court claims that this case "involves an unsound concept for raising large sums of capital" . . . [App. A, (7 a.]) And such claim might have some resemblance of truth if Appellant had told clients to go out and try to raise upwards of $20 million via "limited offering;" [App. A, (6 a.)] however, Morgan's limited offering was for $200,000 not $20 million (Tr. 497c). Century's "'nebulous' answers" to Morse [App. A, (3 a.)] were really offers of service by Century suggesting just how Morgan, not Morse, might resolve his secondary funding problems and still own parts of an amusement park called "Ameripark." [See, Govt. Ex. G3 thru G5: App. C, (X-254–59c)] Mr. Morgan wanted to know who *he* could contact to raise *his* own secondary funding—which is why he termed Century's offers to seek funding for him as "nebulous." Morgan wanted such answers but he did not want to pay for them or the business plan. Contrary to the Court's opinion, no "limited offering" capitalization plan called for more than $250,000 to be raised by the client.

It should be noted that the business plans prepared by Century (limited offerings) were the type of reports clients need to achieve funding according to expert witness Abel [App. C, (Tr. 1075–76c)]:

> "These reports, I think, would be helpful to the clients in taking some of the steps along the way to get funding, so in that sense, I think they would be helpful to obtain funding." *Id* at 1075–76c

The number of "limited offering" only types of clients—Haas (App. C, (Tr. 1107–08c)], Whitmer [App. C, (Tr. 1085c)], Fouts [App. C, (Tr. 595–96c)], Brown [App. C, (Tr. 1548c)], and others [Government admitted eleven other businesses succeeded; App. C, (Tr. 1787c)]—that succeeded in raising large sums of capital in single phase business plans clearly negates the Court's theory. The client's failure to "presumably know their own capabilities" for raising limited offering venture capital does not evidence an *unsound business concept. U.S.* v. *Rabinowitz,* 327 F.2d 62 at 81 (6th Cir. 1964) (i.e. *Rabinowitz* clients could not appreciate their own desire to knit for money.)

Although "secondary financing" was not achieved for Edelman, Morgan, or Webster due to their failure to raise "initial capitalization," such failure does not evidence an "unsound business concept." Consider the Coville Engineering project that successfully concluded a limited offering and *did not* fail for want of "secondary financing" and Webster's successors who built the Sleepyhollow Shopping Center on the site Appellant selected with the ideas from Century's business plan [App. C, (Tr. 793–94c)]; such client projects demonstrate the soundness of raising large sums of capital in two phases.

The judicial edict of the Sixth Circuit that such business planning was unsound for raising large sums of money is contrary to common knowledge within the financial community (See, *Sound Business Concept*, p. 15–17) as well as Appellant's experience as a business consultant of 15-plus years.

Various Alleged Misrepresentations Not Evidenced by the Record

The Court's argument that the instant case has a similar factual basis with *U.S.* v. *Shelton,* 669 F.2d 446 (7th Cir. 1982) is not demonstrated by the record.

The Court's reliance upon the Webster testimony at Tr. 648 [App. A, (5 a.)] does not evidence "that Freeman intentionally misrepresented to them (clients) that Century had procured investors for several projects. Webster's testimony was repetitiously verbose and vague as to the conversation which took place:

> "there was a construction firm, I can't remember the name, but he didn't read off the name . . . *I think it was*, that they had helped and financed . . . there was also a—oh, amusement park type thing . . . it was American, or Americana, *or something like that,* and also a—oh, right here in Grand Rapids there was a hotel or something *they were financing,* some type of complex *they were putting up* . . . He did mention he knew some pilots personally that liked to finance this type of thing, because they had a lot of extra income that *they needed financing* . . . " *Id* at 648–49 (Emphasis added)

Webster cites the same construction company brochures which were

shown to Erbe. [See, e.g. App. C, (Tr. at 96–7c). However with Erbe, the Government attempted to clear the air on who "they" was:

> **Q:** Forgive me, Mr. Erbe, is it your testimony that Mr. Freeman said they had raised funding for the raising of the house project?
> **A.** No. The company that was doing it. The company that was raising these houses, the construction company or whatever it was. *Id* at Tr. 97

The Government was not very interested in clearing up who *they* was with Webster's testimony because certain portions of the testimony did indicate who "they" might be (e.g. at Tr. 648c; "there was a hotel or something they were financing, some type of complex *they* were putting up"); Century wasn't in the business of financing "limited offerings" or "putting up"(constructing) some type of complex or hotel.

The Court takes the Webster testimony (See, e.g. Tr. at 648c: "there was also a—oh amusement park type thing like Cedar Point; it was American, or Americana, or something like that") and states that such representation translates into a Freeman representation "that Century had helped finance Americana Amusement Park, when in fact, Americana's promoter was one of Century's dissatisfied clients who testified against Freeman at trial." [App. A, (5 a.)] However, such specific testimony does not even allude to financing by Century or anyone else; secondly, Americana's promoter did not testify at trial—Mr. Willis E. Morgan d/b/a Ameripark, Inc. testified at trial; and finally, petitioner believes that such piling of inference upon inference is inconsistent with reasonable inferences which may be drawn from such testimony. Whereas *Shelton* defendants did misrepresent actually funding other businesses, the testimony in the instant case indicates that Century *helped* many clients, but the clients sought their own funding.

The *Shelton* case is dissimilar in other respects to the instant case as well. Appellant and Century were independent consultants not part of the "alleged victims'" businesses via management contracts; *Shelton* defendants were principals who directly sought funding upon false data as to the financial well-being of both past and present companies thus defrauding investors, however, the "alleged victims," in the instant case, purchased services for their own independently run company—they did not purchase stock and they were to seek their own funding; moreover, the Appellant, although foreclosed from performance of funding clients' businesses (Phase II) as an independent financial intermediary, he would have only received 5% if successful and not 21.5%, which two of five *Shelton* defendants exacted and divided into equal shares; and finally, in the instant case, there is a distinct absence of *actual* misrepresentations—impressions and conclusions by the alleged victims" (i.e. "clients' primary goal") are not misrepresentations made by Appellant.

Both the Government and the Court infer that Appellant had no sources and, therefore, even if the acknowledged conditions precedent were met, Appellant would not perform secondary funding because he had "no" sources. [App. A, (6 a.)] Such argument results from piling inference upon inference [See, *Ingram* v. *U.S.*, 360 U.S. 672, 680, 79 S. Ct. 1314 (1959)]. The Court argues that Oberman's testimony offered by Appellant to rebut the charge that he had "no" sources somehow is negated because "none of Century's clients who testified ever had their project presented to Mr. Oberman, and Mr. Oberman testified that Freeman never presented a project to him as a possible investment after the project (Coville Engineering) fell through." [App. A, (5 a.)] How can Appellant be expected to approach Mr. Oberman with Edelman's project, a man who quit before he got started (Tr. at 149–50c)? How can Appellant be expected to approach Mr. Oberman with Webster's project, Webster's embezzlement would have to be disclosed . . . Oberman or any other source would not touch such a project [App. C, (Tr. 1668–70c)]. How could Appellant approach Mr. Oberman with any of the seven clients' "limited offering" capitalization projects considering both Mr. Oberman and Appellant knew such action would violate S.E.C. and Michigan Securities Regulations. [App. D, (4 d.)] Any such direct or indirect solicitation of sources to Oberman by Appellant would have defeated the limited offering exemptions to wit Appellant warned the clients to seek legal advice in order to protect. [App. C, (X-295c)] Had Appellant solicited Oberman for such purposes ("limited offering"), he would have been making a public offering of unregistered security as the exemption from registration would have been defeated. Again, the Court's finding of fact is contrary to Appellant's justifiable omission to act; never-the-less, the Court infers unlawful intent. Mr. Oberman's testimony clearly establishes a source ready and willing to review any project Appellant may offer for his review. (Tr. 1225c)

The Court's *no* sources theory is contrary to: (1) common law contracts (i.e., Appellant was under no obligation to seek funding for such "future" service upon breach of contract by the other party); (2) security regulations in every state (i.e., since Appellant *was not* a principal in any client's business, had he presented such client's "limited offering" prospectus to Oberman, Appellant would be "in effect" selling an unregistered security in violation of the "limited offering" exemption from registration); and, (3) common knowledge as to the availability of sources via books, magazines, newspapers, expert witness testimony of Abel (Tr. 1075–76), Appellant's testimony (Tr. 1659–60c); as well as the testimony of two "alleged victims": Clark (Tr. at 407c), and Morgan (Tr. at 492–93c). The *no* sources allegations, para. 4b–e, reflect a complete absence of knowledge with regard to the

workings of the financial community.

This Court should further note that no client's testimony even alludes to the alleged misrepresentation described in para. 5, Count 1 [App. C, (A-9, 10c)]; nevertheless, the Court below [App. A, (6 a.)] enumerates such allegation just as if the testimony exists:

> "(S)hould they be accepted as clients, (Century) could tap extensive sources for financing." *Id* at 6 a.

Has the Court demonstrated proof beyond a reasonable doubt of Appellant's "specific intent" to defraud? Proof of intent is paramount in a mail fraud case because the "good faith" of defendant is ordinarily a complete defense. *U.S.* v. *Foshe,* 578 F.2d 629, 634 (5th Cir. 1978)

History of Century Consultants (1971—Business Divorce): A Sound Business Concept, Appellant's Good Faith Defense

There is an abundance of evidence with regard to Appellant's good faith performance and intention to carry out the future promises and representations made pursuant to the contract(s) and such actions constitute a defense which the Appellant may assert in a prosecution under the Mail Fraud Statute, 18 U.S.C. § 1341. *Sparrow* v. *U.S.,* 402 F.2d 826, 828–29 (10th Cir. 1968).

Century Consultants has "helped" many clients achieve funding via business planning. The program (financing and marketing concepts) for developing client relations was based upon successful clients who prospered far beyond the consulting fees charged. (*U.S.* v. *Shelton, supra*-distinguished) When Appellant decided to slowly withdraw from Century back in February 1974, he drew up a memorandum to guide incoming management personnel . . . not only with regard to managing the company, but he also outlined how to receive and retain "New Business" (prospective clients). [See, "New Business:" App. C, (X-348–49c)] Century Consultants was never in the business of just getting retainers; Century's previous clientele not only paid the retainer and remaining balance for the production of the business plan, such clients also became a "very important source of income" for subsequent work [i.e., direct marketing, personnel search, negotiating contracts and the like; [See, App. C, (X-347c), 2/4/74 Memo: para. A (3)]. According to Government witness Wagner's testimony, Century was primarily in the business of producing business plans calling for limited offering capitalization by the client (Tr. at 948c); the fact that such method was a successful means of attracting equity capital ("venture capital") supports the basis for such business practice.

All the while Appellant worked at Century, one strict rule was adhered to according to Wagner (Tr. 950–51c) and such rule was also set forth in the Eckersberg Memo:

> ". . . this is a *firm rule and no exceptions* . . . NO ONE in our firm

should ever, under any circumstances whatsoever, involve himself in the sale of securities ("limited offering")... Always remember it is our job to PLAN and it is the lawyer's job to (ac)cept or reject the plan and thereafter guide his client in any sale of securities." *Id* at X347–48c

Century Consultants' doors would not have remained open long enough for even the first "alleged victim" (5/31/74) to pass through if such prior clients had been unsuccessful in raising their capital as Century would not have received the remaining balance due on the business plan or such subsequent work. The alleged "unsound business concept" lacks substance where the client actively pursues funding as agreed, instead of "electing not to pursue that deal."

A Sound Business Concept

The Court contends that Century Consultants developed an unsound business concept for raising large sums of money—but Appellant's established business practices are recognized and accepted by numerous experts in the world of venture capital.

Clients came to Century seeking venture capital for their companies. Such companies were either in the start-up stage or they were being reorganized as new companies. Century Consultants held free exploratory meetings to gather information necessary to assess the viability of a prospective client's business. Contrary to the Indictment, para. 7, the Information Booklet (i.e. sample, X-260–75c) handed each client before the close of such exploratory meeting completely disclosed, on the first page, Century's function and such, explicitly advised why the information was needed:

"Information (is) to aid us in determining *what* should be done, *how* it should be done and on *what* basis." (Emphasis added)

The viability of a client's project could not be assessed without first obtaining considerable background information [App. F, (3 f.): i.e., "The financial intermediary might also be judged by . . . the thoroughness with which he reviews information about the client company." *Id* at 54]

After the information was analyzed, a written offer of services was provided to the clients and their attorneys which spelled out *what* could be done (i.e. design a comprehensive business plan); *how* it should be done (i.e. offer outlined what subject matter would be addressed, including a capitalization plan designed for the client to raise the capital; and upon *what* basis (i.e. the retainer fee and a subsequent payment for the extension of credit was set forth for the development of a Phase I, comprehensive business plan, X-233c).

The retainer letter specifically advised the client to seek legal counsel on the matter of how to transform the business plan into a limited offering circular and thereafter how to sell same within the limited

offering exemption. [i.e. App. C, (X-232–33c)] In *Forbes* magazine (October 11, 1982), Mr. Thomas P. Murphy writes:

> "This article is about the Business Plan . . . (an) absolutely essential document you should assemble before launching a new buiness . . . (i)t becomes a "Private-Placement Memorandum" ("limited offering" circular) if you intend to expose your plan to very many people in an effort to raise capital. If that is the purpose, you should have it reviewed by a lawyer. He will keep you this side of the SEC's limitations on private offerings (limited offerings) and make his presence known by pointing out risk factors . . . " [*Id* at 160, App. F, (6 f.)]

How sound is Appellant's advice in rejecting funding by Century (i.e. private placements to financial institutions) and opting for limited offering funding by the client (i.e. to individuals the client knows). In *Source Guide for Borrowing Capital*, edited by Stanley M. Rubel (Library of Congress, Catalog Card No. 76-51983)(1977), p. 63 [App. F, (5 f.)]: Mr. Rubel, in an article entitled "Private Financing Sources," states:

> "There are a variety of sources for *private financing*. The *greatest amount of capital* to start a business is raised from friends, relatives, customers, suppliers, and individual investors. General estimates indicate that *most capital* for new and emerging businesses is raised from these informed sources." *Id* at 63 (Emphasis added)

And on the following page [App. F, 5 f.), *supra* at p. 64], Mr. Rubel expands upon his reasons why limited offerings to individuals is the preferred alternative for start-up companies because:

> "There are few projects of this nature that are funded by the organized venture capital industry." *Id* at 64

Thus, Mr. Rubel agrees with Appellant's recommendation that clients whose business were start-ups [See, Rubel's definition—*supra* at 64, App. F, (5–6 f.)] should seek limited offering capitalization by the client versus private placement funding.

The financial structuring, set forth in the business plan(s), was consistent with—the best practical method to obtain the most capital—and stay within security exemptions as experts so advise. Alan J. Barton, counsel for the National Venture Capital Association (green book), *supra* at 79, [App. F, 3–4 f.)] states:

> "Since registration, which requires the filing with and clearance by the SEC of a lengthy disclosure document, is a relatively burdensome and costly procedure, the exemptions provided by the 1933 Act are very significant to the venture entrepreneur, and he will have to structure financing transactions to enable him to (use)

these exemptions."

It should be noted, not only did Appellant structure the client's financial plans within such exemptions but he warned the clients to have their attorney explain the limited or private offering exemptions (X-295c).

The offer of service(s) took into consideration the perimeters respecting the amount of money seed companies or start-up companies might properly seek in their endeavor to secure venture capital and still provide for managerial control, which every business plan so provides (i.e. Erbe's offer of service, X-292c). In *Business Week Supplement*, September 13, 1982, entitled "Venturing into Venture Capitalism," at p. 128–29 [App. F, (6 f.)] the article suggests:

> . . . "Entrepreneurs will come around with a detailed business plan . . . Generally, seed companies can require up to $300,000, while start-up financing begins at $500,000. Entrepreneurs are usually reluctant to give up majority ownership."*Id* at 128–29

This Court should note that Century's offer of services concerning all clients' business plans never involved more than $250,000 in Phase I funding (i.e. seed capital and/or limited offering funding combined); as can be seen, such was the amount that newer companies might generally require for the initial stage according to such *Business Week* article, *supra* at 129 (6 f.).

The Court states that comprehensive business plans did nothing to further the "clients' primary goal" but the experts disagree. Brian Haslett and E. Smollen [App. F, (3 f.), *supra* at p. 22] state:

> "When raising equity capital, your business plan is a vital sales tool . . . prospective backers will—or should—insist on reviewing your proposal *before* considering any investment seriously. Some will not even meet with an entrepreneur without first seeing his business plan." *Id* at 22

The Court demonstrates a lack of appreciation for the "inherent utility" of the business plan as a means for providing the clients with what they desire—money. *U.S.* v. *Rabinowitz*, *supra* at p. 66. Appellant's business practice was consistent with legal and practical considerations with regard to raising venture capital for start-up companies.

As to Secondary Financing—Phase II Funding by Century

No client ever came to Century with a business that was a candidate for a "private placement" in the initial stage. Thus where clients' venture capital needs were greater than what could reasonably be raised via limited offering, Century developed a financing program in stages as the experts agree "there are few projects of this nature (start-ups) that are funded by the organized venture capital industry" at the initial stage. [*supra*, at 64; App. F, (5 f.)] However, after successful completion of the initial stage funding, secondary funding is viable via venture capital

companies even though such client companies may still be operating at a loss, according to Mr. Rubel, *supra* (6 f.) at 65:

> "*Second-stage financing* describes an investment in a company that is producing . . . The company needs working capital and expansion capital. Although it has clearly made progress, it is probably still operating at a loss. Both venture capital companies and SBIC's tend to invest at this stage." *Id* at 65

This Court should note Edelman and Webster's offer of service(s) fully incorporated such accepted financial principles and the Coville Engineering project Appellant developed, proves the feasibility of financing in stages.

The Court claims "that Freeman could not have believed, or honestly believed, that he would procure such sources of capital . . . because there were none." [App. A, (6 a.)] However, Appellant's offer of proof to rebut the charge, "no sources," went far beyond the mere testimony of what the Court below called a single "source" witness. [App. A, (6 a.)] Appellant introduced the green book (Tr. at 1659c) *Guide to Venture Capital Sources*, "4th Ed." by Stanley M. Rubel (Library of Congress Catalog Card No. 76-51894), (1977) as evidence of his knowledge on how to approach and locate bonafide sources [See article and listing, "United States Venture Capital Companies," p. 171–332 *supra*, Appellant cited three of 156 pages. [App. F, (4–5 f.) and (7–9 f.)

Moreover, the *Guide to Venture Capital Sources* has been "designed to assist businessmen who are currently seeking venture capital for their companies," according to the book's preface; the author goes on to state in the preface, "(t)he book will also be valuable to many professionals who can assist early stage companies—investment bankers, commercial bankers, consultants, lawyers, accountants, and others." [App. F, (1 f.)] The Court's theory that "(t)he case before us also involves an unsound concept for raising large sums of capital" [App. A, (7 a.)] is obviously not based upon the accepted practice and experience of the financial community (i.e. green book) but rather upon the clients' inability to perceive their desire and capabilities to succeed with an agreed upon plan.

Mr. Silver's article, appearing under Chapter II, "How to Raise and Utilize Venture Capital," "The Financial Intermediary," at page 54 in the green book [App. F, (2–3 f.)] mirrors Appellant's Phase II—"future performance" offer of services to Edelman and Webster [See, App. C, (X-296–97c and X-233c)]. As set forth therein [p. 54, 2–3 f.)]:

> "Financial consultants will frequently analyze the need for funds, prepare a private placement memorandum ("financial proposal") and make introduction to sources of money ("pre-negotiations") . . . (a)ll three financial intermediaries (consultants included) charge a fee at closing of approximately 5% for venture capital (same as

Appellant) . . . (c)onsultants and investment bankers normally charge retainers for preparing the private placement memorandums plus reimbursement of out-of-pocket expenses (same as Appellant).

The article goes on to state:

"To the entrepreneur who needs venture capital but doesn't know where to find it, the financial intermediary reduces his cost of search . . . (t)he financial intermediary offers the client a personal relationship and knowledge of the venture community that should save time and facilitate much greater impact with venture sources . . . (a)nother reason for using a financial intermediary is to prepare your company's business plan." *Id* at 54 (12f)

Mr. Silver's credentials are impressive and include three years in the credit department of Chase Manhattan Bank; A.B. and M.B.A. from the University of Chicago, and the author of several books and magazine articles concerning the entrepreneur. Appellant's business concepts for raising large sums of capital are accepted and practiced in the financial community. The business plans (i.e. X-31–101c) and private placement memorandums (i.e., "financial proposals" like Coville Engineering, X-352–400c) are *necessary* steps if one is to tap the "many, many sources of funds for ventures such as any of these (i.e. Herbert, Brown, and Webster's business plans reviewed by Abel),or any other venture that you might imagine," according to expert witness Abel at Tr. 1075c. Appellant did demonstrate not only an appreciation (need) for taking these steps, he also demonstrated a knowledge of where to go (seek sources) once those steps have been taken. The Court's denunciation that "clients were never given an opportunity to examine potential financial sources because there was none" [App. A, (6 a.)] exemplifies the lack of appreciation for taking such necessary steps *prior to* contacting such sources. Clearly, Morgan's desire to know "exact financial sources Century would tap" for second and third phases [App. C, (Tr. 498c)] prior to even contracting for such services was an unreasonable request. [See, Ernest D. Chu statement, App. F, (2 f.)] Neither Appellant nor any other financial intermediary could have shown those clients "potential financial sources" prior to retaining a consultant to prepare the "basic financial proposal" for the secondary financing.

The right to freely negotiate and thereafter contract would be dealt a serious, if not deadly, blow if *U.S.* v. *Freeman*, *supra* is not reversed. The Court translates: representations of a "'future performance" (Tr. 123; 133; 162; 172), unsuccessfully funded businesses (via "limited offering"), and the lack of profitability of businesses (alleged victims) that never opened to the public, into an unsound business concept for raising large sums of capital.

In light of the Court's decision, the contracts meant nothing. The Court's opinion holds a seller of such services (business plan and/or financial proposal) responsible for guaranteeing "limited offering" capitalization despite the client's unwillingness to raise their own limited offering as proscribed by law and acknowledged by the parties; it also holds such person(s) responsible for guaranteeing profitability of such businesses, notwithstanding the client's lack of effort, merely because Century expressed an opinion that the client's business concepts were viable . . . who would have thought Colonel Sanders with a social security check in one hand and a chicken recipe in the other could build a profitable business or that a "Pet Rock" would be a profitable and viable business concept.

The Court's interpretation of the written and oral representations offered and acknowledged by the contracting parties would have a chilling effect upon the financial community's willingness to prepare business plans, financial proposals for private placements, limited offering prospectuses (prepared by attorneys), and numerous other documents relative to their financial advice with respect to *any* type of proposal for venture capital if failure of the client receiving such work product could translate into a long protracted criminal proceeding ending in a criminal conviction. Moreover, tens of thousands of civil suits could also be filed by such clients seeking legal redress for fees and damages as a result of such client's failure to succeed with the work product because of *their* own failure to appreciate their own capabilities and willingness to succeed. *U.S.* v. *Rabinowitz, supra* at 81. Professional services of such aforementioned variety would indeed cease to exist if such professionals had to risk such criminal, and possibly civil, liability because the trier of fact (jury and/or Appeals Court) could not appreciate the legal significance of what was actually contracted for and delivered and what is or is not a sound concept for raising large sums of capital.

As previously noted, the Court's justification for finding "knowledge" and "specific intent" in fact rests solely upon the failure of the client's ability to raise the "initial capitalization" which was described by Century as the most difficult task before them. Appellant's omission to act upon a future performance was consistent with common law contracts and evidenced no ill intent of Appellant. The Court's theory of "specific intent" to scheme to defraud does not amount to proof beyond a reasonable doubt. *IN RE Winship*, 397 U.S. 358, 363–64, 397 S. Ct. 1068 (1970), it was held, *inter alia*:

> "The requirement of proof beyond a reasonable doubt has (a) vital role in our criminal procedure for cogent reasons . . . Moreover, use of the reasonable doubt standard is indispensable to command

respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id* at 364

In *United States* v. *Swarthout*, 420 F.2d 831 at 833 (6th Cir. 1970), the Court concisely stated the principle which required the dismissal of that prosecution at the end of the Government's case:

"Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond reasonable doubt of the *particular offense* of the federal criminal law with which the defendant has been charged." (Emphasis added)

The Court's collateral theory of "specific intent" does not evidence the Indictment's alleged misrepresentations which were to have been made by Appellant.

REASONS FOR GRANTING THE WRIT

III

Para. 6 of the Indictment charges that clients were informed they had to raise seed capital which would have to be paid to Century Consultants to continue work on arranging the majority of the financing; the Court's opinion alludes to para. 6 by arbitrarily holding that there was only *one type* of business plan and that all funding beyond seed capital was "secondary financing" which was to be obtained through Century Consultants' sources. However, the Court "omitted" the limited offering business plans, which clearly were not any part of secondary financing (contrary to Government's admission) and disregarded the proof that seed capital was not to be paid for anything other than the "credit" that had been extended for production of the limited offering comprehensive business plan.

III

The Court Committed Plain Error

The evidence in the light most favorable to the Government proves the Court's theory to be false.

The evidence, the contracts and alleged victims' own testimony, provides unrebutted proof that *three* distinctly different types of business plans existed among the seven alleged victims that Appellant met or dealt with prior to the "business divorce":

A. A "limited offering" plan which specifically rejected "private placement" funding to be obtained by Century Consultants and specifically told the client that he must obtain his own "limited offering" financing. No "seed capital" plan was discussed or involved in this limited offering business plan. Four of the seven

clients only contracted for this type of business plan: Herbert, Erbe, Morgan, and the Clarks (X-5–8c; X-289–92c; X-401–04c; 111–14c);

B. A plan that called for nothing but "seed capital": this plan was provided to Jenkins for $500 (X-105–09c); this seed capital plan was to be followed by a "limited offering," however, Jenkins, after raising the $15,000 as set forth in the plan . . . never came back to Century Consultants because he went to a consultant he knew in Lansing (Tr. 487c); and,

C. A plan that called for two phases of financing: Phase I involved a "seed capital" plan and a "limited offering" plan; Phase II involved a "private placement" for which Century Consultants agreed to develop a "second business plan," referred to in the contract as the "basic financial proposal," for additional fees of $50/hr. and thereafter to work as a finder on a contingent fee of 5% to locate "institutional" sources of funding. The only client to contract under this single agreement encompassing both phases was Edelman (X-293–98c). After paying his retainer and receiving his business plan, Edelman decided against proceeding—his testimony was . . . "I elected not to carry on with that deal." (Tr. 149–50; 155c)

Webster was offered the same type of contract as Edelman, but Webster refused the Phase II finders' fee work by Century when the bargain was struck (i.e. No authorization until 6/9/75; X-227–28c) and only contracted for Phase I work. (X-230–34c) After paying his fees for the Phase I—limited offering business plan on 5/29/75 (X-229; 244c)—Webster entered into a separate contract on 6/9/75 for the Phase II finders' fee work wherein Century would seek funding upon a contingency fee basis. (X-227–28c) Webster only obtained $60 to $65,000 of his Phase I seed capital and limited offering and admitted to embezzling his shareholders' money and thus, Phase II work was foreclosed by Webster himself.

Only Edelman and Webster's "Phase II" portions of their contracts called for Century Consultants to seek funding through Century Consultants' sources; seed capital was never to be paid to Century for work to "obtain" any financing; Jenkins and Webster were the only clients to raise any seed capital—Jenkins kept all $15,000 for his own operating expenses (Tr. 476c); Webster raised $25,000 seed capital (Tr. 652c) and paid $7500 of it to Century for the "credit" extended to him [See, 2nd paragraph under: With Respect to our Fees . . . Phase I: (X-233c)] for the production of his Phase I "limited offering" business plan. Edelman's contract called for him to raise $25,000 in seed capital and pay the $8000 balance he owed on his comprehensive limited

offering plan (X-296c) but Edelman never raised any seed capital. Seed capital *was not* paid to work on the majority of any client's financing as paragraph 6 charges—it was to be paid to Century because Century extended credit for development of the "comprehensive business plan" under Phase I (X-233c).

The Court's opinion states . . . "Should the client manage to raise the seed capital, Century would then offer further services for obtaining the second larger phase of capital on a contingent fee basis." This finding constitutes "plain error"—limited offerings were not part of the "second, larger phase of capital" to be secured by Appellant upon a contingent fee . . . no contract or testimony supports the Court's inference (i.e. limited offering funding by Century Consultants). Clearly, the fees tendered by five of the seven clients (Herbert, Erbe, Morgan, Clark and Jenkins) were paid for nothing more than seed capital and/or limited offerings type business plans; clearly, Webster tendered the fees in question (i.e. $7500, Count 7) for nothing more than a seed capital/limited offering type business plan (no fees were tendered for his secondary funding contract (X-227–28c); and finally, Edelman's fees, as the contract clearly states, were paid for the production of his seed capital/limited offering type business plan and he foreclosed any future performance by his own decision.

The Court committed "plain error" when it "omitted" limited offering funding by the client and arbitrarily held Appellant responsible for "all" clients' funding *beyond the seed capital* [contrary to Government admission; See, App. E, (2 e.)]

REASONS FOR GRANTING THE WRIT

IV

The scheme to defraud as depicted in the Indictment, paragraphs 1–8, was not supported by a scintilla of evidence; Appellant did not represent or otherwise promise funding by Century as described therein, and such Court's affirmance of Appellant's conviction for mail fraud is unconstitutional under the Due Process Clause of the Fifth Amendment.

IV

The arguments set forth under Sections I, II, and III of the brief demonstrate a lack of evidence regarding Appellant's intent and the various misrepresentations alleged as part of the scheme and artifice to defraud as depicted in paragraphs 1 thru 6, Count 1 of the Indictment. Such arguments demonstrate the *deficiency of*: the "clients' primary goal" as Appellant's representations to fund clients; proof of Appellant's intent based upon lack of future performance when such non-performance was justifiable (Tr. 123c; 133c; 162c; 172c); a variety of unalleged acts

(Indictment) argued upon facts not contained in the record (i.e. ad, expressed opinion, unsound business concept, etc.); various alleged misrepresentations not contained in the record (i.e. Tr. 648c, no sources, if accepted as client—funding by Century); and the Indictment's single business plan theory whereby all funding beyond seed capital was to be raised by Century upon receipt of client's seed capital monies notwithstanding the fact that three different offers of services were contracted for by the clients wherein limited offering funding was the client's responsibility and seed capital monies were to be paid Century for *credit extended* for designing limited offering type business plans.

Appellant further contends that the record is also void of any such representation with respect to paragraph 7, Count 1; the only evidence in the record with respect to how such information would be used—appears on the face of the document [i.e. App. C, (X-260c); also See, *Sound Business Concept*, p.15 : experts agree with Appellant's need and use of such information.]

With regard to paragraph 8, Count 1 [App. C, (A-18c)], Appellant further states that such alleged non-performance of *promised* acts (funding by Century) as contemplated within the alleged "scheme to defraud" should be adjudicated upon the individual contracts and corresponding oral representations made thereto with respect to *each* client. No client claimed Appellant did not act pursuant to the oral representations and contract—only the Government and the Court claim these individuals were due a performance not bargained or paid for by the clients. To infer that *any* of the seven clients were due "secondary funding" by Century is "plain error" even in a light most favorable to the verdict.

There simply is *no* testimony by the "alleged victims" to support the alleged misrepresentations that were specifically pleaded as "part of the scheme and artifice to defraud" (para. 1–8, Count 1). The Court's unpublished opinion is premised upon facts immaterial to Appellant's specific intent and non-existent as to Appellant's alleged acts. The "clients' primary goal" is and always was the subjective impressions, conclusions, and desire of the clients. Petitioner believes that "clients' primary goal," if pleaded in an Indictment to demonstrate the existence of a scheme to defraud, would give cause to quash such Indictment (i.e. no *mens rea* of accused).

The scheme to defraud as alleged in the Indictment is not supported by a scintilla of evidence. The "scheme to defraud" as portrayed in the alleged misrepresentations as enumerated in the Indictment was *never* demonstrated by *any* evidence . . . instead the Court below attempted to demonstrate fraud via the clients' failure to achieve their primary goal, however such "facts" presented were either immaterial (i.e. subject

impressions, conclusions, and their desire) or such "facts" were unsubstantiated by the record. [See, *Appellant Denied Fair Trial Argument*, p. 25–27] It is undeniably the duty of the Supreme Court to insure that individuals are not convicted upon Indictments where the evidence is totally devoid of one or more elements of the crime (i.e. *mens rea* and *actus rea*). The leading case in this area is *Thompson* v. *Louisville*, 362 U.S. 199, 80 S. Ct. 624 (1960), therein the Court stated: "The ultimate question presented to us is whether the charges against petitioners were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Id* at 654. Petitioner contends that the "no evidence rule" of *Thompson, supra*, setting the standard for Supreme Court review of State convictions is equally applicable to review on certiorari to the Circuit Court of Appeals. The "no evidence rule" is applicable to the Indictment and the facts set forth in the record and such rule should be applied to a case wherein the scheme to defraud as alleged in paragraphs 1–8 of Count 1 is not supported by a scintilla of evidence. Appellant was effectively denied the "due process of law" by virtue of the Court affirming conviction upon an unsupported Indictment. *Amendment V, United States Constitution.*

REASONS FOR GRANTING THE WRIT

V

Appellant was effectively denied his right to a fair trial by the Court introducing extraneous matter not found in the record. *Amendment V, United States Constitution.*

V

Throughout the Unpublished Opinion the Court below has introduced extraneous *facts* either not found in the record or such *facts* are unsupported by the record. Appellant seeks reversal upon the following misapprehensions of the "evidence" to wit the Court below premised guilt:

1. The Court below alleged promises of funding by Appellant to fourteen victim witnesses [App. A, (1–2 a.)], however Alexander, Green, Susnjara, and Bosse never testified at trial; Dawson, Raleigh, and Boeldt, all post-business divorce clients, testified as having no knowledge of Appellant (Tr. 174c, Tr. 629–30c, and Tr. 294–95c respectively); the Clarks testified as being only introduced to Appellant—no business discussions (Tr. 367c); Jenkins couldn't recall any discussions he had with Appellant (Tr. 474c); Herbert could only recall a 10–20 minute discussion with Appellant limited to his problems and possible solutions (Tr. 300–01c); Erbe's testimony recalls only representations of successful funding by *clients* and not Century (Tr. 97c); Morgan said . . . "to do the

consulting work, and they wanted $5000." (Tr. 496c) . . . "Well Phase I was for me to find $200,000—by making an offering, if you will, to 20 investors for $10,000 apiece. This was made clear to me before I parted with any money" (Tr. 498c); and Morgan's testimony confirms offers by Century to seek funding (Tr. 497c: Govt. Ex. G-3, 4, 5) after he successfully concluded his $200,000 limited offering (Tr. 498c), but Morgan did not contract for any one of the three offers, he merely *assumed* funding by Century (Tr. 498c)—Morgan never raised the $200,000 (Tr. 500c). The two remaining client's testimony (Edelman and Webster) proves up the existence of a contract calling for a Phase I limited offering type of business plan and Phase II future funding services by Century which were to be rendered upon completion of Phase I limited offering—however such Phase II ("secondary financing") services were foreclosed by these clients (See, Argument II, p. 7). The 14 "victim" witnesses did not testify as alleged by the Court below.

2. Century *did not* mail an acceptance to the new client, accompanied by a memorandum. [App. A, (2 a.)] Clients either accepted or rejected the memorandum which set forth the basis of employment. An offer is *never* an acceptance; such is a basic principle of contract law.

3. Mr. Phillip Morse *did not* refuse to pay any more than the initial $5000 retainer [App. A, (3 a.)] because Mr. Morse was not a victim and he did not testify. Mr. Morse was the Government prosecutor.

4. According to the record, the written memorandum and comprehensive business plan *did not* reinforce the clients' belief of funding by Century [App. A, (5 a.)] as such testimony (Tr. 162c) was objected to and sustained by Judge Miles. Clearly the hypothetical situation (reinforced belief) was not evidence.

5. Freeman *did not* misrepresent to Edelman that Century would provide sources of investors (Tr. 123, 133, 162, 172) [App. A, (5 a.)]. As previously discussed (Argument II, p. 7), Edelman acknowledged his contractual duty to seek limited offering funding, however Edelman elected not to proceed, thus excusing Century's future performance.

6. Contrary to the Court's finding, Edelman *understood* prior to paying $5000 (5/8/75, X-305c) and prior to receiving the business plan what his obligations were. [App. A, (3 a.)] It was spelled out in the agreement he signed (Tr. 155c) on 4/18/75 (X-289c); Edelman knew he had to raise Phase I capital and repay credit extended to him (X-296, para. 5 some 20 days prior to paying $5000 on 5/8/75.

7. The Court claims the reports repeated much of the information originally presented to the consultants by the client [App. A, (2 a.)], however petitioner submits for example: Mr. Herbert supplied eleven pages of information (X-15–25c) and received 68 pages (X-33–101c); Mr. Webster submitted four pages of information (X-236–39c) and

received 84 pages (X-136–220c).

Expert witness Abel who reviewed Herbert and Webster's business plans (Tr. 1070c) stated, "—in each case there's a charge set forth, and the sections of the report are responsive to the charge. They do the things they say they're going to do." (Tr. 1069c) The contracts outlined the areas of business planning to be addressed (X-231c, para. 2), and Century delivered as promised.

Throughout this brief, including the examples cited herein, petitioner has demonstrated that such unpublished opinion has misapprehended: who testified; what testimony was actually received into evidence; the understanding of the parties as to what services were actually contracted; as well as the differences between the financial plans (who was to raise what funding and when and what each individual fee was being tendered for) and all of which was clearly delineated in the exhibited contracts. One can only conclude that where the reviewing Court substitutes argument abound with extraneous facts not found in the record for actual evidence, Appellant was denied the right to a fair trial and thus, the "Due Process of Law" as guaranteed under the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

VI

There is a plain conflict between the Circuits wherein the Court below did not attempt to demonstrate: the existence of a conspiracy agreement; a divergence from legal to illegal conduct; proof of Appellant's membership in the alleged conspiracy by independent evidence; and a single act specifically alleged as "part of the scheme and artifice to defraud" as enumerated with paragraphs 1 thru 8, Count 1, inclusively.

VI

No Evidence of Conspiracy

Count 8 (Indictment)

"1. The Grand Jury realleges and incorporates by reference herein, all paragraphs of Count 1 of this Indictment excepting the last paragraph thereof, as *constituting a scheme and artifice to defraud*, . . ." (Emphasis added) [App. C, p. *A-18c*, record of Court of Appeals)]

The arguments set forth under I, II, III, and IV of this brief demonstrate the Court's indifference toward the alleged scheme and artifice to defraud as depicted in Count 1, paragraphs 1 thru 8. The testimony of the alleged victims does not recount the misrepresentations described therein as being made by Appellant, Wagner, or Powell. Instead, the Government and the Court below have argued that the representations, impressions, and conclusions of the *clients'* desire for funding by Century ("clients' primary goal") coupled with an ad, that solicited no one to Century for such purpose somehow amounts to representations to "prepare a business plan

for each client which would show what methods of funding Century Consultants would use to obtain funding for the client" (para. 4f, the substantive charge of the Indictment). The Court recites various excerpts of testimony (Tr. at 123, 133, 162, 172) relating specifically to only a *future performance* detailed in a written contract to allegedly demonstrate that Appellant misrepresented that Century would provide the sources of investors for all clients beyond seed capital, however, the Court refuses to review the limited context of such representations as to the individual contracts and two parties' subsequent actions which hindered such future performance.

The testimony of Haas (Tr. 1104–09c) and Whitmer (Tr. 1084–90c) demonstrate that Appellant's prior dealings with clients (pre-Indictment) were consistent with Century's dealings with Herbert, Erbe, Morgan, the Clarks, Jenkins, Edelman and Webster—only, these two previous clients and others, succeeded (i.e., Brown, Fouts, Coville, and the like). The Government did not prove that Appellant ever departed from legitimate consulting services to an illegal activity. *U.S.* v. *Wieschenberg*, 604 F.2d 326, 331 (5th Cir. 1979) The "clients' primary goal," as previously stated, was *their* desire and *not* Appellant's representation to satisfy such desire. The *Wieschenberg* Court held:

> "The proof adduced, which we must measure by the standard of *United States* v. *Warner* (5th Cir. reasonable doubt standard), must be proof of an agreement to depart from the legal course and proof of an overt act in furtherance of the illegal, not the legal, objective." *Id* at 331

The testimony and exhibits adduced at trial clearly indicated that all consultants acted pursuant to the contractual arrangements made between the parties. The Court and the Government seem to ignore the fact that prior to 12/31/74, the day Appellant resigned as officer, director and employee and became a sub-contractor (Tr. 1607c), only three clients were alleged to become victims. Appellant's actions were consistent with the agreed upon contractual performance. Herbert's itemized time sheets (X-10–12c) reveal about 37 hours of work by Appellant on his business plan and a 10–20 minute discussion with Appellant concerning Herbert's problems and some possible solutions (Tr. 300–01c). Erbe's testimony recalls Appellant explaining how other clients funded their own businesses (Tr. 97c) and the presentation of the Erbe offer of service. And Morgan's testimony relates how the whole process was laid out—Morgan to find 20 investors at $10,000—before I parted with any money (Tr. 496–98c) and Appellant only took an eight hour trip with Morgan to meet land owners (X-278c).

After 12/31/74, Appellant's contact with Century Inc. and the clients and/or their projects came at the request of Century management via a

sub-contracting relationship which began 1/3/75. Appellant was no longer a full time consultant at Century Inc. after Powell purchased the stock (Tr. 1474c). Appellant was paid only for task assigned and performed (Tr. 1030; 1495–96c); Appellant was paid to attend Jenkins' free exploratory meeting and author the retainer letter whether or not Jenkins retained Century Inc. Appellant had no further interest in Jenkins (Tr. 1503c). Other than the two tasks relating to Jenkins, the only other client work Appellant was assigned prior to 5/14/75 relates to going with Edelman to get buy-out option for Kelly Color Labs in Morganton, North Carolina (X-299–301c); holding a couple meetings to discuss offer of services with Edelman and his attorney prior to the trip; and designing the financial section of the business plan Edelman authorized Century Inc. to prepare. Century Inc. did not request Appellant's help with regard to the Clarks; they only met informally with Appellant and discussed World War II (Tr. 367–68c) . . . such limited interaction however did not deter the Court below from finding Appellant guilty on the substantive charges relating to the Clarks' (Count 3 and 4).

Appellant's sub-contracting arrangement continued through Powell and Wagner's partnership and into Century Corp. (Tr. 1495–96c), a company whch was run independently by Powell and Wagner (Tr. 1492–1520c). Appellant was assigned to design Webster's financial section of the business plan; to attend meetings with Wagner and Webster; and negotiate a land option for Webster's shopping center. However, Appellant had no interest in the $7500 allegedly taken by fraud from Webster (Tr. 910; Tr. 1500–01c); he was only paid for hours worked (Tr. 1030; Tr. 1493c). In *U.S.* v. *Shelton*, 669 F.2d 446, (7th Cir. 1982) the Court below claimed similar facts with the instant case, however, with regard to the conspiracy, the 7th Circuit Court noted an exact split of the monies between defendant's and various written and oral misrepresentations regarding the soundness of the investment when such company was shown by competent evidence to be in trouble absent defendant's creative bookkeeping methods. The Court in *U.S.* v. *Klein*, 515 F.2d 751, 753 (3rd Cir. 1975) states:

> "To support a conspiracy conviction, the Government must show both an agreement and a specific intent to achieve some unlawful goal." *Id* at 753

Appellant has argued from the outset that the above alleged scheme involved no more than a client receiving:

> ". . . exactly what Century contracted to give him. The real question is whether or not a person who delivers what he promises in language at least plain enough for most people to understand, can be guilty of fraud because of a failure to deliver what the customer desired and believed (in some instances) would be forthcoming." Appellant's

Brief at 13 [App. A, (3 a.)]

The evidence demonstrates that Appellant's actions were consistent with his oral representations and the written contracts . . . with pre-Indictment clients as a sole proprietor . . . with Herbert, Erbe, and Morgan as a Century employee, consultant . . . and with Jenkins, Edelman, and Webster as a sub-contractor/independent consultant. How clients were treated by Century Corp. after Appellant ceased doing business with Powell and Wagner (business divorce—Fall, 1975), Appellant has no knowledge.

The agreement and specific intent to achieve some unlawful goal as described in *Klein, supra* cannot be founded upon inferences (i.e., "client's primary goal") and innuendos [i.e., falsely the Court stated the ad solicited seekers of venture capital, App. A, (3–4 a.)]. The Supreme Court has warned, "(c)harges of conspiracy are not to be made out by piling inference upon inference." *Ingram* v. *U.S.*, 360 U.S. 672, 680, 79 S. Ct. 1314, 1320 (1959) (quoting *Direct Sales Co.* v. *U.S.*, 319 U.S. 703, 711, 63 S. Ct. 1265 (1943). All evidence points toward the legal activity—producing a limited offering type business plan pursuant to the contracts. The alleged overt acts were simply mailings made pursuant to the legal acts (i.e., billing for work tendered and received, Count 3 and 4).

Notwithstanding the Court's collateral theory of a scheme to defraud which is contrary to the charge set forth in Count 8, para. 1., the Court still failed to meet the test of *Klein, supra* at 753. The Court [App. A, (9 a.)] merely concludes that the Government has presented sufficient evidence to establish . . . a conspiracy, however, such Government briefs and the evidence cited therein, fall short of the tests for conspiracy as enumerated in *Wieschenberg* and *Klein, supra*.

CONCLUSION

We respectfully pray that the petition for certiorari be granted, and that this conviction be reversed and remanded for such further proceedings as this Court may order.

Respectfully submitted,

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APPENDIX A

UNPUBLISHED OPINION

No. 80-1624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GURN H. FREEMAN, *Defendant-Appellant.*	ON APPEAL From The United States District Court for the Western District of Michigan.

Decided and Filed October 1, 1982.

Before: LIVELY, KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. We affirm Gurn Freeman's conviction of six counts of mail fraud, transportation of a check "knowing the same to have been taken by fraud," and conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 2314. He was sentenced to five years imprisonment followed by five years of probation and fined $11,000. Most of the issues presented on appeal were considered by District Judge Miles in his opinion denying a motion for a new trial.

Mr. Freeman forcefully and effectively argued his own appeal. The main issue on appeal is whether the prosecution presented sufficient evidence of a scheme to defraud to constitute a violation of 18 U.S.C. § 1341, viewing, as we must, the evidence " 'in the light most favorable to the government.' " *United States* v. *Stull*, 521 F.2d 687, 689 (6th Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). Fourteen "victim" witnesses in need of "venture capital" testified about Freeman's alleged "scheme to defraud" them of money through false representa-

tions that Century Consultants could provide them with needed capital for expanding or recapitalizing their present business or starting new enterprises. Century Consultants placed an advertisement in *the Wall Street Journal* which offered: "Need Venture Capital? Marketing Assistance? Business Guidance? Century Consultants [phone number]." Each of Century's clients stated their needs for capital from the beginning. The initial interview consisted of a Century principal describing the many successful enterprises Century had financed, and the interviewee atempting to "sell" his project to the firm. The prospective client left with an elaborate application requesting extensive information on his financial status, the history of the company or business to be capitalized, the projected plan, and personal history. After the form was returned, Century would then submit the project to its "New Client Committee," which was invariably enthusiastic about the profit potential and investment feasibility of the planned project and accepted the new client.

Century mailed an acceptance to the new client, accompanied by a memorandum which set forth a rough plan for recapitalization by incorporation, limited partnership, joint venture, or similar device, and divided investment potential into at least two phases. The potential client was always told that he must first present a stronger position to investors by obtaining an initial capitalization through "A Limited Offering" which Century Consultants, if retained, would help the client prepare. The retainer for such work was $5,000, out of which would come the $50 per hour consulting fee, and the total fee was estimated to range from $7,500 to $16,000. *See, e.g.*, Exhibits App. at 5-8, 105-09, 111-14, 230-34, 293-98.

If the client retained Century and sent $5,000, the consultants would then prepare a "Confidential Business Report." This report repeated much of the information regarding background, history and details of the proposal, as originally presented to the consultants by the client. This report would

suggest a limited offering to raise the initial or "seed capital." Should the client manage to raise the required seed capital, Century would then offer further services for obtaining the second, larger phase of capital on a contingent fee basis. Consulting fees continued, however, at $50 per hour plus all expenses for travel and accommodations, and the fees were paid from the seed capital raised by the client.

Clients became disenchanted with Century at various stages of the scheme. Mr. Edleman realized after paying $5,000 and receiving the comprehensive business plan that he would be raising money on his own, while paying a fee to Century. (Tr. at 155.) Mr. Phillip Morse refused to pay any more than the initial $5,000 retainer because of "nebulous" answers to his repeated queries as to the exact financial sources Century would tap to obtain the needed capital for the second and third phases of his project. (Tr. at 509.) Gorden Webster was the most tenacious of the clients who testified. He raised his own "seed capital" of $25,000 even before Century completed the comprehensive business plan. From April, 1975, through September, 1976, Webster continued paying Century consulting fees totaling some $27,000. (Tr. at 729; Exhibits App. at 122-45.) Webster never received any funds through Century.

Essentially, defendant argues that the above scheme involved no more than a client receiving:

> . . . exactly what Century contracted to give him. The real question is whether or not a person who delivers what he promises, in language at least plain enough for most people to understand, can be guilty of fraud because of a failure to deliver what the customer desired and believed (in some instances) would be forthcoming.

Appellant's Brief at 13. Defendant argues that the written memorandum explained, before the client parted with any money, that the client would be responsible for raising the seed capital. Second, the memorandum and the comprehen-

sive plan stated that subsequent phases of raising capital would not begin until after the client had succeeded in obtaining the seed capital. Third, a separate agreement was signed on a *contingent* fee basis for Century to act as a finder for the bulk of the desired capital. And fourth, the client was always encouraged to employ a lawyer and an accountant to participate in the proceedings. Finally, defendant offered the testimony of an expert witness that the comprehensive business plan had "some value." (Tr. at 1069.)

Even assuming the five factors noted above to be true, there is sufficient evidence in the record of a scheme to defraud. In order to be prosecuted under the mail fraud statute, the defendant must commit an actual fraud; that is, he must have a specific intent to deceive or defraud. *Epstein* v. *United States*, 174 F.2d 754 (6th Cir. 1949). The scheme must include representations made by the defendant which are known to be false, and one or more persons must be defrauded. *United States* v. *Rabinowitz*, 327 F.2d 62 (6th Cir. 1964). Proving intent through misrepresentations does not require a showing that Freeman never entertained any hope that his clients' ventures would be successful. Rather, the jury may find that Freeman had "no basis in fact for believing that the business to be operated . . . would be profitable, and that appellants' expressed opinion to that effect was therefore not actually entertained or at least not honestly entertained." *Irwin* v. *United States*, 338 F.2d 770, 774 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965). Nor is proof that a defendant intended or desired to complete a project for his investors an excuse for knowing misrepresentations. *United States* v. *Ilabel*, 613 F.2d 1321, 1325 (5th Cir.), *cert. denied*, *Carcaise* v. *United States*, 447 U.S. 925 (1980).

Whether or not the comprehensive business plans had some value as a basic outline for business reorganization and marketing, they did nothing to further the clients' primary goal: to have Century Consultants find investors for their projects. Not only did the advertisement solicit seekers of venture

capital, but the government witnesses testified that such was their purpose in hiring Century Consultants, and that that purpose was emphatically set forth during initial consultations. Further, although the written memorandum and comprehensive business plan are written in suitably ambiguous language, those documents read in light of oral misrepresentations made to the clients reinforced their belief that Century would provide at least the bulk of the sources of investment. Freeman misrepresented to various clients that Century had successfully funded other businesses. (*See, e.g.*, Tr. at 648, Webster testimony that Freeman represented that Century had helped finance Americana Amusement Park when, in fact, Americana's promoter was one of Century's dissatisfied clients who testified against Freeman at trial.) Freeman further misrepresented that Century would provide the sources of investors for his clients. (Tr. at 123, 133, 162, 172.) Freeman offered the testimony of a single "source," to rebut the charge that he had no such sources. Ike Oberman, a certified accountant, testified that he became interested in a project for which Mr. Freeman had asked him to prepare a financial projection. (Tr. at 1211.) Taking the initiative, Oberman suggested that he might be interested in becoming a principal for the project and could ask other sources to invest as well. (Tr. at 1212 *et seq.*) Although Freeman agreed and a good deal of potential capital was raised, that particular project never progressed past the planning stage. None of Century's clients who testified ever had their project presented to Mr. Oberman, and Mr. Oberman testified that Freeman never presented a project to him as a possible investment after the project fell through.

Viewed as a whole, the evidence is sufficient for the jury to conclude that Century Consultants' clients, based on advertisements in the *Wall Street Journal*, approached that organization for the sole purpose of finding a source of venture capital; that Freeman intentionally misrepresented to them that Century had procured investors for several projects and,

should they be accepted as clients, could tap extensive sources for financing; that the clients never received any funding from Century; and that Freeman could not have believed, or honestly believed, that he would procure such sources of capital.

These misrepresentations distinguish this case from *United States* v. *Rabinowitz*, 327 F.2d 62 (6th Cir. 1964), cited by the appellant as requiring reversal of his conviction. In *Rabinowitz*, this Court analyzed the permissible bounds of sales talk in overturning a mail fraud conviction. Customers in that case never paid any money until they had been shown the object of their purchase, a knitting machine, and had a lesson on how to use it. The machine "was not a flimsy fake. It was excellently designed and well built." *Id.* at 80. Only 14 of 689 purchasers testified for the government that they could not make the garments fast enough to make the payments on the machine, while "a number" testified that they had indeed been able to make enough garments to make the payments easily. Thus this Court concluded:

> There was sales talk, yes — there were exaggerations. But they were made to people who had seen the machines and could presumably know ther own capabilities. That both salesmen and purchasers were mistaken as to this does not spell out an intent to deceive.

Id. at 81. In the case before us, in contrast, clients were never given an opportunity to examine potential financial sources because there were none. Whatever hopes Freeman might have had that the "Limited Offering" presented by his clients might help them raise money, he could not have an honest belief that such would raise upwards of $20 million. In sum, Freeman's sales talk exaggerated and puffed up an underlying illusion, not a well built machine available for a customer's inspection.

The recent case of *United States* v. *Shelton*, 669 F.2d 446 (7th Cir.), *cert. denied*, *Bledsoe* v. *United States*, 102 S.Ct.

1989 (1982), is similar on the facts to the case before us. In what was described by the Court as "a bucolic variant of a 'Ponzi scheme,'" the defendants in *Shelton* sought investors for a farmers' cooperative which would establish facilities for the buying and selling of farm products and equipment. The defendants, though very successful at raising funds, paid themselves so much in management and "consulting fees" that the cooperative's proposed facilities "remained an improbable, if not impossible, dream." *Id.* at 450. The Court concluded that there was sufficient evidence for the jury to infer that the defendants defrauded investors with the farmers cooperative concept, which provided "the potential for lucrative personal returns through the . . . consulting agreement" and that the defendants had made "various misrepresentations about the success of [a prior] operation." *Id.* at 453. The case before us also involves an unsound concept for raising large sums of capital which offers lucrative personal gain for the defendants through consulting fees and includes misrepresentations about the success of prior financing projects.

Even if a scheme to defraud is proven, Freeman contends, Count One of the conviction must be vacated because the government failed to prove that the letter involved was mailed to witness Jenkins rather than hand delivered. Title 18 U.S.C. § 1341 is violated when the perpetrator of a fraudulent scheme "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be delivered by mail. . ." any such matter. As has been stated by both this Court and the Supreme Court, " 'Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'caused' the mails to be used.'" *United States* v. *Talbott*, 590 F.2d 192, 195 (6th Cir. 1978), *quoting Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). Further, " '[t]hat the confirmation letters and mailed check could have been hand-delivered

or delivered otherwise than through the mails, is immaterial.'" *Talbott, supra,* at 195, *quoting United States* v. *Stull,* 521 F.2d 687, 689 (6th Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976). Mr. Jenkins received the letter in question in March, 1975. (Tr. at 475; Exhibits App. at 110). At that time, Freeman ran the company. (Tr. at 867). He continued to be active on a regular basis after the sale of Century to Misters Powell and Wagner, completed May 14, 1975 (Tr. at 867; Exhibits App. at 329). The above is ample evidence that Freeman "caused" the letter to be mailed.

Freeman raises three more issues which may be dealt with briefly. First, he asserts that the trial judge committed prejudicial error by allowing a question and answer which informed the jury that Wagner had been indicted for activities concerning Century Consultants. Wagner was a co-defendant, but entered a plea of guilty before the trial began. In this same assignment of error, Freeman claims to have been prejudiced by the testimony of a witness that Powell had been "duped" when he bought Century from Freeman, and by questions during cross-examination concerning two civil cases bought against Freeman in 1964 and 1970. We agree with Judge Miles that "in neither case was the potentially prejudicial testimony allowed to proceed beyond the point at which the possible prejudice to defendant became evident, and in both these instances any prejudice to defendant was minimized by prompt remedial action." (Opinion and Order on Motion for New Trial, App. at 47; *see* Tr. at 1126-32; 1735-45.)

Second, Freeman asserts that the trial judge considered matters outside of the trial record when a directed motion for acquittal was denied. Specifically, the trial judge mentioned in his oral denial that:

> They [the Government witnesses] came as a result of ads in the papers or otherwise. Some of them came to an individual known as Angel or Angel Wilson, known to this Court as a person who has been convicted of a similar type of offense as that charged here, and in those

> instances, when they came to Angel Wilson, . . . they were routed to the defendants . . . .

(Tr. at 1052-53.) Judge Miles sets out his reasons for denying the motion for acquittal carefully and thoroughly in pages 1048 through 1055 of the Transcript. It is quite apparent that the reference to Mr. Wilson's past history with that court is merely made in passing and that Judge Miles did not rely on it in any way in making his ruling. It was clearly harmless error which did not affect any substantial rights of the defendant. Rule 52(a), F.R.Crim.P.

Third, the defendant complains that he should have been allowed to obtain credit reports on the government's witnesses in order to refute the suggestion that Century Consultants was the cause of their business failures. The rule for appellate review of discovery orders is:

> If the order is adverse to the defendant it may be reviewed on appeal after conviction, but the possibility of reversal is slight, since the courts hold that they must affirm unless the trial court abused its discretion and will not reverse if the court order was not prejudicial.

1 Wright, Federal Practice and Procedure § 261, p. 534, and cases cited therein (1969 & 1980 Cum. Supp.). Judge Miles denied the appellant's motion for the discovery order after carefully weighing the minimal, collateral relevance of the credit reports of the witnesses against the substantial privacy right of and potentially serious prejudice to the witnesses. (Tr. 28-31.) He did not abuse his discretion in such a ruling.

Finally, Freeman submitted to this Court a pro se brief attacking virtually every element of his conviction. We have considered the arguments presented therein and have concluded that appellant received a fair trial on all counts. Specifically, the Government presented sufficient evidence to establish intent to defraud, a conspiracy, and use of the mails; the trial court's denials of several motions for severance were

proper; the trial judge did not abuse his discretion in admitting evidence of the sale of stock; and the prosecutor did not go beyond the acceptable bounds of argument in his closing statement.

Accordingly, the conviction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 1 1982
JOHN P. HEHMAN, Clerk

No. 80-1624

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GURN H. FREEMAN,

Defendant-Appellant.

Before: LIVELY, KEITH and MERRITT, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by Gurn Freeman for appellant, Phillip Morse for appellee.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

John P. Hehman
Clerk

Issued as Mandate: NOVEMBER 29, 1982

COSTS: NONE

Filing fee.....$
Printing $
Total $

A True Copy.
Attest:

Deputy Clerk

No. 80-1624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

NOV 24 1982

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee v. GURN H. FREEMAN, Defendant-Appellant	ORDER DENYING PETITION FOR REHEARING EN BANC

Before: LIVELY, KEITH and MERRITT, Circuit Judges

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

(2 b)

No. 80-1624

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

Dec 9 1982

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee v. GURN H. FREEMAN, Defendant-Appellant	ORDER DENYING PETITION FOR REHEARING EN BANC

Before: LIVELY, KEITH and MERRITT, Circuit Judges

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

(3 b)

APPENDIX C

Appendix C is comprised of the record (Indictment, Argument, Testimony and Exhibits) from the United States Court of Appeals, Sixth Circuit. Petitioner intends to supply this Court with such number of copies of same as the Court shall advise and render same as soon as petitioner and respondent agree upon its (App. C) contents.

APPENDIX D

Title 18, Chapter 63—Mail Fraud, § 1341. Frauds and swindles, p. 4301, U.S.C.A.

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, 62 Stat. 763; May 24, 1949, ch. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub. L. 91–375, § (6) (j) (11), 84 Stat. 778.)

Title 18, Chapter 113—Transporation of stolen goods, securities, money, fraudulent State tax stamps, or articles used in counterfeiting, § 2314, p. 4371, U.S.C.A.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. (June 25, 1948, ch. 645, 62 Stat. 806; May 24, 1949, ch. 139, § 45, 63 Stat. 96; July 9, 1956, ch. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87–371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub. L. 90–535, 82 Stat. 885.)

Title 18, Chapter 19—Conspiracy, § 371. Conspiracy to commit offense or to defraud United States, p. 4190–91, U.S.C.A.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, 62 Stat. 701.)

Title 18, Chapter 1—Principals, § 2, p. 4151–52, U.S.C.A.

§ 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, ch. 645, 62 Stat. 684; Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

Amendment V, Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime . . . be deprived of life, liberty, or property, without due process of law . . ."

Corbin on Contracts, *1 Vol. Ed. (1980): Chapter 2, § 25. Offer by Publication or Advertisement, p. 43.*

> It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. Neither the advertiser nor the reader of his notice understands that the latter is empowered to close the deal without further expression by the former. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear.

Chapter 68, § 1252. Discharge of Duty by Non-Performance of a Condition, p. 1010-11.

> When a contractual duty is subject to a condition precedent, whether that condition is express, implied, or constructive, there is no duty of immediate performance and there can be no breach of that contractual duty by mere nonperformance, unless the condition precedent is either performed or excused. If such a condition precedent is neither performed nor excused within the time that is required, such failure now makes it impossible for a breach of contract to occur. Nonperformance of the primary contractual duty can now never operate as a breach of it; and no remedy for enforcement will ever be available. Therefore, the contractual duty must be regarded as discharged.[1] *Id* at 1010
>
> Frequently, the condition precedent consists of the performance, in part or in full, of the agreed exchange by the other party. That party's failure to render such performance ordinarily constitutes a breach of contract on his part; and the discharge of the one party may be said to be a discharge by the breach of the other. But even though the other party has not promised to render the agreed exchange, and his failure to perform is no breach whatever, nevertheless if his performance is a condition precedent of the first party's duty, that duty is discharged as

1. Restatement, Contracts, § 395: "A contractual duty is discharged by the unexcused failure of a condition to occur within the time necessary to create a right to the immediate performance of the duty."
Restatement, Contracts, § 274; "(1) In promises for an agreed exchange, any material failure of performance by one party not justified by conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge.

soon as the condition cannot be performed. In such case, the discharge is a discharge by nonperformance of a condition precedent, not a discharge by breach of the other's contractual duty. *Id* at 1011

Michigan Securities Regulations, Chapter 188, Uniform Securities Act, Act 265 of 1964, Title 19—Trade and Commerce, Part IV, § 19.776 (402), § § 10(A), page 247, M.S.A.

§ 19.776 (402) Exempt securities and transactions.] SEC. 402. (a) The following securities are exempted from sections 301 and 403:

(10) Any offer or sale of a preorganization certificate or subscription [in a corporation], and the issuance of securities pursuant thereto, if:

(A) No commission ◆ is paid or given directly or indirectly for soliciting any prospective subscriber;

Securities and Exchange Commission Regulations, Securities and Exchange Act of 1933, Title 15—Commerce and Trade, § 77c. Exempted Securities, (a) (11) page 2648-49, U.S.C.A.

§ 77c. Exempted securities.

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory. (May 27, 1933, ch. 38, title I, § 3, 48 Stat. 75; June 6, 1934, ch. 404 § 202, 48 Stat. 906; Feb. 4, 1887, ch. 104, title II, § 214, as added Aug. 9, 1935, ch 498, 49 Stat. 557, and amended June 29, 1938, ch. 811, § 15, 52 Stat. 1240; May 15, 1945, ch. 122, 59 Stat. 167; Aug. 10, 1954, ch. 667, title I, § 5, 68 Stat. 684; Aug. 21, 1958, Pub. L. 85-699, title III, § 307 (a), 72 Stat. 694.)

Uniform Commercial Code § 2-202

Sec. 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1–205) or by course of performance (Section 2–208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

APPENDIX E

GOVERNMENT ADMISSIONS:

Reference, Government's First Reply Brief, dated Sept. 4, 1981, p. 21:

"He *did* promise plans, and in fact *did* provide them."

Reference, Government's Second Reply Brief, dated Oct. 14, 1981, p. 23:

"Appellant did provide his victims with a plan pursuant to his contract with them."

Reference, Government's First Reply Brief, dated Sept. 4, 1981, p. 28:

"Equity" financing was the 'limited offering' or 'seed capital' which the witnesses, at least some, indeed testified they knew they had to raise themselves. Significantly, it was the secondary financing Appellant promised, but never delivered."

Reference, Government's Second Reply Brief, dated Oct. 14, 1981, p. 27:

"Coville project failed for reasons not attributable to financing."

Reference, Appendix C, see Tr. 1787:

"Your Honor, that information I get out of my notes, and I have reason to believe they're fairly accurate, that there were 11 companies that were successful in every instance."

APPENDIX F

1. SBA (booklet) *What it is . . . What it does.* U.S. Small Business Administration, Office of Public Information (OPI-6) August 1974, at p. 25:

"Most businesses fail for lack of good management."

2. *Guide to Venture Capital Sources* (Green Book), Fourth Edition edited by Stanley M. Rubel. Copyright © 1977, 1974, 1972 and 1970 (Library of Congress Catalog Card Number 76–51894).

PREFACE

Guide to Venture Capital Sources has been prepared by Capital Publishing Corporation as part of its series of special resource book-directories, which are designed to be of assistance to owners of small and medium-sized businesses and entrepreneurs.

The *Guide to Venture Capital Sources* has been designed to assist businessmen who are currently seeking venture capital for their companies and for entrepreneurs who are thinking of founding their own businesses. It will also be helpful to anyone who is interested in preparing themselves to start a business someday and must know how the venture process works. The book will also be valuable to the many professionals who can assist early-stage companies—investment bankers, commercial bankers, consultants, lawyers, accountants, and others. This fourth edition again represents a major expansion of the editions published in 1970, 1972, and 1974, both in amount of text material and in number of directory listings.

A second book in this series of special resource books is *Source Guide for Borrowing Capital.* It provides a wealth of easy-to-use information on the myriad of federal government, state government, and local and community business development programs. It also contains new information on such traditional sources of debt financing as banks, insurance companies, finance companies, and leasing companies. The book contains directory information on all of these sources of borrowed capital.

A third book in the series is *Guide to Selling a Business.* This book-directory identifies corporations that have active acquisition programs and also the more successful intermediaries in the field. It also contains twenty articles written by leading corporate executives and professionals in the merger and acquisition business.

Capital Publishing Corporation also prepares newsletters on

related fields. In all, these books and newsletters are designed to assist business owners and their advisors in utilizing to best advantage the many sources available to help them succeed in their businesses.

Stanley M. Rubel
Editor

3. *Guide to Venture Capital Sources, supra*; chapter entitled "How to Raise and Utilize Venture Capital; article, "Selecting the Right Venture Capitalists," sub-section "Financial Intermediaries" by Ernest D. Chu, vice president of Roussel Capital Corp., a venture capital and merchant banking organization that invests in early-stage companies. Prior to joining Roussel he was senior vice president and director of the investment banking firm of Danes Cooke & Keleher, Inc. *Id* at48

at p. 51

"Don't expect to get names of venture capital firms unless you become a client." *Id* at 51

4. *Guide to Venture Capital Sources, supra,* "The Financial Intermediary" by A. David Silver. Mr. Silver has operated an investment banking business since 1970, specializing in venture capital and debt financings for small companies. During the last six years, he has assisted more than thirty companies in raising over $50 million. Prior to the formation of his investment banking business, Mr. Silver was for six years an associate in the corporate finance department of Kuhn, Loeb & Co., responsible for that firm's venture capital activities, and prior to that, for three years, in the credit department of Chase Manhattan Bank. He received A.B. and M.B.A. degrees from the University of Chicago. Mr. Silver has written several books and magazine articles for entrepreneurs and is a frequent speaker on the subject of entrepreneurship. *Id* at 53, 54

There are three models of financial intermediaries to choose from: the finder, the financial consultant, and the investment banker. Unfortunately, they are less distinguishable by price than by performance. Finders merely locate money. Financial consultants will frequently analyze the need for funds, prepare a private placement memorandum, and make introductions to sources of money. Investment bankers will break down the need for funds into different securities, investigate the business in depth, prepare a private placement memorandum, locate different sources of money, and negotiate terms. All three financial intermediaries charge a fee at closing of approximately 5% for venture capital, 2% for unsecured loans, 1% for secured loans

or a combination of slightly smaller cash fees plus warrants, options, or common stock. Consultants and investment bankers normally charge retainers for preparing private placement memorandum plus reimbursement of out-of-pocket expenses.

"The financial intermediary might also be judged by the depth of his investigation of the entrepreneur, the thoroughnes with which he reviews information about the client company."

"**Cost of Search**
To the entrepreneur who needs venture capital but doesn't know where to find it, the financial intermediary reduces his cost of search."

"The financial intermediary offers the client a personal relationship and knowledge of the venture community that should save time and facilitate much greater impact with venture sources." *Id* at 54

5. *Guide to Venture Capital Sources, supra,* "Preparing a Business Plan;" Brian Haslett and Leonard E. Smollen. *Id* at 21. Leonard E. Smollen is co-founder of the Institute for New Enterprise Develepmont (INED). He previously held executive positions at EG&G, Inc., and subsequently worked with Alexander Dingee on the Sloan School project. Brian Haslett is development director of INED and played a leading role in many of the new businesses INED helped create and finance. He is also the eastern associate of S.M. Rubel & Associates, has managed CPC seminars on raising venture capital, and is a contributor to *Venture Capital.* Previously he was with Arthur D. Little, Inc. *Id* at 15, 16.

"When raising equity capital, your business plan is a vital sales tool. Before risking their money for what may be a period of five years or longer, most venture capital investors will want to satisfy themselves that you have thought through your plan carefully and that you and your associates have enough skill and experience in your chosen business area to manage effectively, seize opportunities, solve problems *and* make profits. These prospective backers will—or should—insist on reviewing your proposal *before* considering any investment seriously. Some will not even meet with an entrepreneur without first seeing his business plan." *Id* at 22

6. *Guide to Venture Capital Sources, supra,* "Legal Considerations for the Entrepreneur Seeking Venture Capital," by Alan J. Barton. Mr. Barton is a partner in the firm of Nossaman, Krueger & Marsh, Los

Angeles, California, and specializes in corporate and securities matters with special emphasis on venture capital. He acts as counsel for the National Venture Capital Association and is a writer and lecturer on corporate and securities law matters. *Id* at 76

> "Since registration, which requires the filing with and clearance by the SEC of a lengthy disclosure document, is a relatively burdensome and costly procedure, the exemptions provided by the 1933 Act are very significant to the venture entrepreneur, and he wil have to structure financing transactions to enable him to these exemptions."
>
> "Section 4(2) of the 1933 Act exempts from the registration requirements "transactions by an issuer not involving any public offering." *Id* at76

7. *Guide to Venture Capital Sources, supra,* "United States Venture Capital Companies."

> "Information about 521 venture companies located in the United States has been compiled largely on the basis of questionnaires received from them. While this information is believed to be accurate, there was no way to verify the data received.
>
> Names of officers or partners are shown for the independent venture firms, but only appropriate officers are listed for investment banking operations, commercial banks, insurance companies, and operating companies with venture activities. The companies have indicated the officer or person that should be contacted about new financing proposals. Each venture firm listed has been categorized by type of organization, that is, private venture firm, SBIC, subsidiary of operating company, and so forth. Differences between these types of firms have been described in the articles in this book."
>
> Each entry in the directory shows project preferences. While some firms have indicated that all types of financing are of general interest to them, most prefer to finance either early-stage projects (start-ups and first-stage financing) or later-stage projects (second- and third-stage financing or buy-out or acquisition financing)." *Id* at 171
>
> "The venture companies have also indicated minimum operating data they will consider in new financing proposals. This feature of the directory is designed to indicate the range of interests of the venture firms, but the minimum *does not* mean that most of a venture company's financings will be of this nature." *Id* at 172

The venture capital firms generally indicated their own minimum and preferred investment, but most of these firms will help raise more money for larger projects, for which they will act as the lead investor. Some financings have run up to $5 million, although the venture firm itself may only have invested $500,000. On the other hand, investment bankers and consultants generally described the minimum and preferred size of the total private placement, and not the amount the firm itself is interested in investing (which is likely to be a far smaller amount). In some cases, both of these amounts are indicated. *Id* at 173

Note: First 3 pages of 156 pages of listings of venture capital firms from this book have been inserted in this Appendix (7f, 8f, 9f) to demonstrate availability of sources.

8. *Source Guide for Borrowing Capital,* edited by Leonard E. Smollen, Mark Rollinson and Stanley M. Rubel. Copyright © 1977 (Library of Congress Catalog Number 76-51983). Stanley M. Rubel is the founder of Capital Publishing Corporation and has been its president since 1961. The firm produces resource books and newsletters for use by small and medium-sized businesses engaged in raising debt and equity capital and in selling businesses. Mr. Rubel is a principal of S.M. Rubel & Company, an affiliated business that provides consulting services in these areas. Mr. Rubel is also Executive Director of the National Venture Capital Association. *Id* at 63

Chapter, "Private Financing Sources"

"There are a variety of sources for private financing. The greatest amount of capital to start a business is raised from friends, relatives, customers, suppliers, and individual investors. General estimates indicate that most capital for new and emerging businesses is raised from these informal sources."*Id* at 63

"Start-ups (also called *seed deals*) involve companies either in the process of being organized or those that have been in business a short time (one year or less) but have not yet completed a prototype or taken orders for a product. Generally, such firms have selected their key officers, prepared a business plan, made market studies, etc.

Capital for start-ups is generally provided by informal sources, such as relatives, friends, customers, clients, and wealthy individuals. There are a few projects of this nature that are funded by the organized venture capital industry, but they must meet exceptionally high standards, both in the quality of the people involved and in the potential for the business being

established.

First-stage financing involves companies that have expended their initial capital on the prototype, developed some evidence of commercial interest in the product, evolved a going organization, perhaps acquired some pilot production equipment, and even obtained a small line of bank credit. It is generally at this stage that the first outside capital flows in from organized venture capital sources.

Second-stage financing describes an investment in a company that is producing and shipping, whose accounts receivable and inventories are building up, and whose marketing expenses have begun to mount. The company needs working capital and expansion capital. Although it has clearly made progress, it is probably still operating at a loss. Both venture capital companies and SBICs tend to invest at this stage." *Id* at 65

9. *Forbes* Magazine, October 1982, entitled, "Venture Capital, The Business Plan," by Thomas P. Murphy. Mr. Murphy heads a venture capital firm. Partnership Dankist; Stanford, Connecticut.

This article, the seventh in a series is about the Business Plan, that dull-as-dishwater, absolutely essential document you should assemble before launching a new business. Starting without a business plan is like starting a cross-continent road trip without a map. You will get somewhere, but it might not be where you intended to go.

To put this in context, the preceding articles have taken you through the scanning process—how to think about yourself as an entrepreneur, how to consider new business ideas; how to buy a company; and how to approach franchising. All this is "dining-room-table" planning. Its end product is the Business Plan. It becomes a "Private-Placement Memorandum" if you intend to expose your plan to very many people to raise capital. If that is the purpose, you should have it reviewed by a lawyer. He will keep you this side of the SEC's limitations on private offerings and make his presence known by pointing out risk factors: "There can be no assurance this turkey will ever get off the ground with his scheme to . . . "

10. *Business Week Supplement*, September 13, 1982 entitled "Venturing into Venture Capitalism."

"Generally, seed companies can require up to $300,000, while start-up financing begins at $500,000. Entrepreneurs are usually reluctant to give up majority ownership."

PRIVATE CAPITAL CORPORATION

First National-Southern Natural Bldg. 1222
Birmingham, AL 35203
205-251-0152

Officers
William W. Featheringill, Pres.
William P. Acker III, V.P.

Whom to contact
Either of above

Type of company
Private venture capital firm investing own capital
Consulting or investment banking firm evaluating and analyzing venture projects and arranging private placements
Consulting firm preparing proposals
Finder

Project preferences

Type of financing
First-stage financing
Second-stage financing
Third-stage financing
Buy-out or acquisition financing

Minimum operating data
Annual sales–$500,000-1,500,000
P & L–losses (profits projected in 2 years)

Industry preferences

Technology
Pollution control

Computer related
Computer peripherals
Card readers, printers

Manufacturing
Crime prevention and detection equipment
Food products
Machine tools
Patented proprietary
Plastics
Materials handling equipment
Sports equipment
Furniture
Metals fabrication
Merger and acquisition orientation

Additional information about company
Years in business–2-5
Minimum investment–$100-300,000
Preferred investment–$300-600,000
Prefer active role as a deal originator
Deals completed in past year–0-2
Invested during past year–under $1 million

ALASKA BUSINESS INVESTMENT CORPORATION

Box 600
Anchorage, AK 99501
907-279-6913

Officers
D. L. Mellish, Pres.
Michael O. Barry, Mgr.

Whom to contact
Michael O. Barry

Type of investor
SBIC

Affiliation
National Bank of Alaska

Project preferences

Type of financing
Second-stage financing

Industry preferences
None

Geographical preferences
Alaska

Additional information about company
Years in business–3-5
Minimum investment–$100-300,000
Preferred investment–$300-600,000
Prefer active role as a deal originator
Deals completed in past year–0-2
Invested during past year–$1 million or less

ALYESKA INVESTMENT CO.

1815 South Bragaw Street
Anchorage, AK 99504
907-279-9584

Officers
C. R. Elder, Jr., Pres.
N. Roy Goodman, Gen. Mgr.

Whom to contact
N. Roy Goodman

Type of investor
MESBIC

Affiliation
Alyeska Pipeline Service Company

Project preferences

Type of financing
First-stage financing
Second-stage financing

Industry preferences
None

Geographical preferences
Alaska only

Methods of compensation
Return on investment is primary concern; no fees

Additional information about company
Years in business—over 5
Minimum investment—$100,000 or less
Preferred investment—$100,000 or less
Will function in either active or passive role
Deals completed in past year—over 5
Invested during past year—$1 million or less

DINEH COOPERATIVES, INCORPORATED

P.O. Box 569
Chinle, AZ 86503
602-674-3411

Officers
Robert E. Salabye, Pres.
Jon D. Colvin, Treas.

Whom to contact
Either of above

Type of investor
Community development corporation

Project preferences

Minimum operating data
Annual sales—nominal or up to $500,000
P & L—losses (profits projected in 2 years or more)

Industry preferences

Manufacturing
Various types

Retail
Various types

Services
CATV
Hotels and motels
Various types

Geographical preferences
Within two hours of office in Navaho Nation grazing districts 4, 5, and 10

Methods of compensation
Return on investment is primary concern; no fees

Additional information about company
Years in business—3-5
Minimum investment—$100,000 or less
Preferred investment—$100-300,000
Will function in either active or passive role
Invested during past year—$1 million or less

AMERICAN-EURO INTERFUND CORP.

44 Montgomery Street
San Francisco, CA 94104
415-391-1545

Officers
Wallace R. Hawley, Pres.
Scott Hedrick, V.P.

Whom to contact
Scott Hedrick

Type of investor
SBIC; subsidiary of operating company

Affiliation
SHV-North American Holding Corp., offshore company interested in larger investments

Project preferences

Type of financing
Second-stage financing
Third-stage financing
Buy-out or acquisition financing

Minimum operating data
Annual sales–$500,000-3,000,000
P & L–break even

Industry preferences

Distribution
Industrial products
Medical products
Sports equipment–wholesale
Various other types

Retail
Franchise businesses–food
Franchise businesses–nonfood
Mail order
Various other types

Services
Various types

Geographical preferences
None

Methods of compensation
Return on investment is primary concern

Additional information about company
Years in business–3-5
Minimum investment–$100-300,000
Preferred investment–$300-500,000
Will function in either active or passive role
Deals completed in past year–2-5
Invested during past year–$1-5 million

JEFFERSON W. ASHER, JR.

4118 Stansbury Avenue
Sherman Oaks, CA 91423
213-789-0266

Owner
Jefferson W. Asher, Jr.

Type of company
Private venture firm investing own capital
Consulting firm evaluating and analyzing venture projects and arranging private placements
Finder

Project preferences

Type of financing
First-stage financing
Second-stage financing

Minimum operating data
Annual sales–$500,000-1,500,000
P & L–losses (profits projected in 2 years)

Industry preferences

Technology
Telephone-related products

Manufacturing
Chemicals
Plastics
Merger and acquisition orientation

Medical
Clinical laboratories
Diagnostic centers
Drugs and medicines

Natural resources
Specialty raw materials

Geographical preferences
West Coast

Methods of compensation
Return on investment is most important but also charge closing fees, service fees, etc.
Professional fee whether or not deal closes (varies with the situation)

Additional information about company
Years in business–over 5
Minimum investment–$100-300,000
Preferred investment–$300,000 and over
Will function in either active or passive role
Deals completed in past year–0-2
Invested during past year–$1 million or less